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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

CITY OF UPPER ARLINGTON, *et al.*,

Petitioners,

v.

JAMES VITTITOW, *et al.*,

Respondents,

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER REGULATION OF PICKETING THAT CREATES A CAPTIVE AUDIENCE IN THE HOME IS RESTRICTED BY THE FIRST AMENDMENT SOLELY TO PICKETING THAT OCCURS DIRECTLY IN FRONT OF A PARTICULAR RESIDENCE?

LIST OF PARTIES

The parties to the proceedings and in this Court are Petitioners City of Upper Arlington, Ohio; City Attorney Sharon H. Pfancuff, Chief of Police Thomas J. Kulp; and City Manager Richard A. King, the defendants-appellees and cross-appellants below, and Respondents James Vittitow; Marisa Vittitow; Ken Hunley; Stephanie Hunley; Rick Knapshaefer; Carolyn Knapshaefer; Zoe Vankleek; Bob Skovgard; Vivian Skovgard; Paul Baker; Patty Hott; Mike Nestor; Allyse Kerns; Dorcey Stidham; Anita Stidham; and Richard W. Ulbrich, the plaintiffs-appellants and cross-appellees below.

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JAMES VITTITOW, *et al.*,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners City of Upper Arlington, *et al.*, respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on January 12, 1995.

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals for the Sixth Circuit are reported at 43 F.3d 1100 (6th Cir. 1995). Those opinions have been reprinted in Appendix A. The opinion of the United States District Court for the Southern District of Ohio is reported at 830 F. Supp. 1077 (S.D. Ohio 1993). That opinion, the order accompanying a preliminary injunction, and a clarifying entry have been reprinted in Appendix B.

JURISDICTION

This action arose under 42 U.S.C. §1983, and jurisdiction was vested in the United States District Court for the Southern District of Ohio by 28 U.S.C. §§ 1331; 1343(4)(a)(4). The appeal and cross-appeal from the preliminary injunctive relief ordered by the District Court were predicated on 28 U.S.C. §1292(a). The Court of Appeals for the Sixth Circuit transformed the relief granted into a final order when it reversed and remanded the District Court's order "with instructions to enter a permanent injunction barring enforcement of *this* ordinance *as written*." *See* App. at A-17 [43 F.3d at 1107](emphases in original). This Court's jurisdiction arises under 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS INVOLVED

FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FOURTEENTH AMENDMENT, SECTION 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ORDINANCE PROVISION INVOLVED

CODIFIED ORDINANCE SECTION 517.17
CITY OF UPPER ARLINGTON

No person shall engage in picketing before or about the residence or dwelling of any individual in this City.

STATEMENT OF THE CASE

The facts pertinent to this Petition can be briefly stated.[1] Respondents come from the Dayton, Ohio, area where a particular doctor performs abortions. That same doctor resides in a small cul-de-sac in the City of Upper Arlington, Ohio. *See* App. at B-3;4 [830 F. Supp. at 1078]; App. at A-2 [43 F.3d at 1101]. On at least three occasions, Respondents traveled more than seventy miles to the City of Upper Arlington in order to picket the doctor's residence in protest against the abortions he performed in Dayton. *See* App. at A-2;3 [43 F.3d at 1101-02]. On August 24, 1992, in response to citizens' complaints about the residential picketing, the City enacted an ordinance which provides: "No person shall engage in picketing before or about the residence or dwelling of any individual in this City." The City Council enacted this ordinance because, "notwithstanding issues of free speech, people are entitled to privacy and sanctity of their own home." App. at B-4;5 [830 F. Supp. at 1078-79]. The text of the City ordinance, as will be discussed further *infra*, is exactly the same in all material respects as the ordinance restricting residential picketing that this Court upheld against a constitutional challenge in *Frisby v. Schultz*, 487 U.S. 474 (1988).

On October 3, 1992, Respondents again traveled to the City of Upper Arlington and picketed the doctor's home. When they were observed engaging in what City police officers had probable cause to believe was a residen-

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[1] The panel majority in the Court of Appeals incorporated some of the District Court's findings of fact and left undisturbed the rest. None of the findings of fact made by the District Court was overturned or found to be "clearly erroneous."

tial picket that targeted a particular residence in violation of the City ordinance, they were ordered to abandon the cul-de-sac but were permitted to march through adjoining neighborhoods. *See* App. at A-3-5 [43 F.3d at 1102].

The probable cause found by the police officers was based on their observations of the picketing activity, "which consisted of slow marching around the sidewalks of the cul-de-sac on which the doctor's home is located." App. at B-10 [830 F. Supp. at 1081]. Although the picket line was marked by the continuous movement of the picketers, who were about twenty in number, it nonetheless constituted "the functional equivalent" of a "siege" of the doctor's home. App. at B-11 [830 F. Supp. at 1081]. As the District Court found:

> At virtually any given moment, one or more of the plaintiffs was in front of the doctor's house. As a result, it would have been nearly impossible for the doctor to leave his house, or back his car out of the driveway, without having to confront one or more of the plaintiffs. Looking out a front window, the doctor would, at any given moment, see one or more picketers on the sidewalk directly in front of his house. The doctor and his family were, in effect, trapped, unwilling recipients of plaintiffs' speech. *Id.*

In addition, other circumstances known to the police officers led them to conclude that Respondents' picketing targeted the doctor's residence. These circumstances included: (1) a tape recording the police had of a message publicizing the trip, which stated that "there is a picket this Saturday, October 3rd, there in Columbus outside the office or home of [the] abortionist," App. at A-3 [43 F.3d

at 1102 n.1]; (2) picketers' signs stating the doctor's name and address, App. at A-3-4 [43 F.3d at 1102 & n.3]; and (3) the other residential picketing that had recently occurred at that address, *id.* These facts underscore the District Court's finding that "[t]here can be no doubt that the doctor was the subject of plaintiffs' picketing." App. at B-10 [830 F. Supp. at 1081].

Respondents filed suit under 42 U.S.C. § 1983, raising an as-applied challenge to the City's ordinance under the First and Fourteenth Amendments. *See* App. at A-5 [43 F.3d at 1102]; App. at B-4;8 [830 F. Supp. at 1078, 1080 n.1]. The District Court initially issued a preliminary injunction prohibiting the City from enforcing the ordinance as long as the picketers remained moving at all times, did not "stop or gather in front of or around any residence," and did not "give undue emphasis to directing their activities to one residence." App. at A-5 [43 F.3d at 1102]. Ultimately, however, the District Court modified the terms of the injunction to provide a more easily enforced "bright line standard" that allowed Respondents "to picket in the doctor's neighborhood and even on the cul-de-sac" but did not permit them to picket in front of "the doctor's home" and "the two homes on either side of the doctor's home." App. at B-12;13 [830 F. Supp. at 1081-82]. The District Court's order thus created a three-house "zone of residential privacy" that would be free from picketing, but otherwise permitted picketing to occur in the same general vicinity. *Id.*

On appeal, a panel majority in the Court of Appeals disapproved the District Court's modified order and criticized it as an improper "one-size-fits-all injunction." App. at A-17 [43 F.3d at 1107]. It concluded by transforming the trial court's ruling on the motion for a preliminary injunction into an order embodying a final

disposition of the case when it reversed and remanded "with instructions to enter a permanent injunction barring enforcement of this ordinance as written." *Id.*

The panel majority reached this result by adopting a narrow reading of *Frisby*, which had upheld an essentially identical ordinance only seven years ago. Quoting with emphasis the Court's statement in *Frisby* that "only focused picketing taking place solely in front of a particular residence is prohibited," 487 U.S. at 483, the panel majority held that *Frisby* does not permit a municipality to enforce the identical ordinance against picketers whose movements cause their picket line to be anything other than a picket stationed in front of only one residence. App. at A-17 [43 F.3d at 1107]. This conclusion was thought to be reinforced by the Court's more recent decision in *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994), which "makes it clear that any linear extension beyond the area 'solely in front of a particular residence' is at best suspect, if not prohibited outright." App. at A-14 [43 F.3d at 1105] (quoting *Madsen*, 114 S. Ct. at 2530). In this regard, the panel majority apparently judged as legally irrelevant the District Court's finding of fact that in this case the slowly moving picket line constitutes "the functional equivalent" of a "siege" of one particular residence that makes the inhabitants a captive audience by trapping them in their own home. App. at B-11 [830 F. Supp. at 1081].

In arriving at its narrow reading of *Frisby*, the panel majority offered some unusually frank observations about the Court's decision in that case. The panel majority criticized the Court for construing the "identical" ordinance upheld in *Frisby*, which "was unconstitutionally overbroad as written," to save its constitutionality "by the

extraordinary measure of accepting counsel's representation at oral argument before the Supreme Court about how the ordinance would be enforced." App. at A-15 [43 F.3d at 1106].

The third panel member dissented, stating that he would have upheld the preliminary injunction granted by the District Court on the straightforward principle that "[t]he targeted homeowner is as much a captive audience when picketers repeatedly march in front of a home as when they are standing still." App. at A-27 [43 F.3d at 1111] (Martin, J., dissenting). "Merely because the plaintiffs chose to march slowly by other residences, as well as the targeted residence, does not insulate their activity from regulation. . . . The psychological injury and disturbance to the tranquility of the home are not reduced because the picketers are marching slowly." *Id.* He thus concluded that the "three-house zone provided for here is no more burdensome than necessary to protect the significant governmental interest in protecting residential privacy. [*Madsen*, 114 S. Ct.] at 2524. The plaintiffs may still march through the neighborhood, on the cul-de-sac, and even in front of the targeted house (though at a distance)." App. at A-28;29 [43 F.3d at 1111]. Any other ruling, the dissenting judge noted, would allow picketers to evade the terms of such ordinances through wholly artificial means while still creating "a situation where the target of the picket is a captive audience or whose residence is under siege." App. at A-27 [43 F.3d at 1110-11].

REASONS FOR GRANTING THE WRIT

The ruling below exemplifies the kinds of problems that have surfaced since the Court decided *Frisby v. Schultz*, 487 U.S. 474 (1988), as the lower courts have sought to apply that decision to parties who have tailored their conduct in conscious reaction to the narrowest possible reading of the Court's opinion. Clarification of *Frisby* is necessary to prevent citizens, local governments, and the lower courts from being confronted by situations that would allow ready evasion of the Court's holding in *Frisby*. Courts are facing this problem in a growing number of settings as a variety of groups increasingly wield the First Amendment to justify their intrusions upon the residential privacy of targeted individuals.

In addition, the lower courts are in conflict over how to apply *Frisby* to more recent developments in residential picketing. Some courts have adopted an extremely narrow reading that limits permissible regulation only to pickets that are posted in a single location directly in front of a particular residence. Other courts have adopted a broader, bright-line reading by creating specified "picket-free" zones of residential privacy in response to the situations that arise in particular cases. Still other courts have adopted a third approach that would allow regulation of picketing that targets a particular residence and is conducted in such a manner as to create a "captive audience" inside the home. This case -- in which the District Court's initial order, the District Court's modified order, and the Court of Appeals' final disposition generally embody these three distinct approaches -- presents a square opportunity for the Court to resolve this confusion by providing guidance to the lower courts.

I. THE COURT SHOULD GRANT THE WRIT TO CLARIFY ITS HOLDING IN *FRISBY* TO AVOID THE POTENTIAL FOR READY EVASION OF THAT DECISION.

The City of Upper Arlington has consistently recognized the right of protesters to march through its neighborhoods, which includes passing in front of the homes that are their focus. When that right is abused by picketing that imposes a captive audience in the targeted residence, however, the City's commitment to freedom of expression collides with its equally firm commitment to residential privacy. Only at the intersection of those basic commitments has the City judged its ordinance on residential picketing to be violated. The City's approach thus reflects a faithful application of *Frisby*. The most pertinent doctrinal difficulty at this point, however, is that further developments in residential picketing activities since *Frisby* threaten to render its holding irrelevant to the concerns that the Court articulated and sought to protect in that very case.

In *Frisby*, the Court upheld the constitutionality of a municipal ordinance that prohibited "picketing before or about the residence or dwelling of any individual in the Town of Brookfield." 487 U.S. at 477. The same language was conscientiously enacted by the City in this case. In *Frisby*, the Court construed this "ban to be a limited one; only focused picketing taking place solely in front of a particular residence is prohibited." *Id.* at 483. "General marching through residential neighborhoods, or even walking a route in front of an entire block of houses, is not prohibited by this ordinance." *Id.* If these passages were given the narrowest possible reading, the Court might be understood to have sanctioned only the regulation of picketing that is posted in a single spot located directly in

front of a particular residence. Based on this narrow reading of *Frisby*, which was adopted by the panel majority in this case, *see* App. at A-17 [43 F.3d at 1107], any attempts to protect residential privacy to any greater degree would be barred as unconstitutional.

The difficulty with this narrow reading of *Frisby* is twofold. First, it would permit parties to evade the reach of such regulation by wholly artificial means that are properly irrelevant to the constitutional calculus. If residential picketing involved continuous movement of any kind, no matter how slight or immaterial, then *Frisby* could conceivably be found no longer to apply. *Cf. State v. Castellano*, 506 N.W.2d 641, 643 (Minn. App. 1993) (protestor fined for conduct where he "commenced marching in one place as though he was walking" but did not "physically leave the street in the area in front of" the targeted residence). Alternatively, if the picket line were constructed so that individual picketers walked a route that took them in front of one or more other residences -- even though some picketers, and thus the picket line as a whole, remained directly in front of the targeted residence the entire time (as was true in this case) -- then again *Frisby* would be rendered a nullity, at least insofar as the decision was intended to provide some actual protection for residential privacy.

Second, this narrow reading of *Frisby* is unconvincing because it fails to do justice to the considerations that expressly informed the Court's decision. The specific factual context in *Frisby* has been confused with an absolute constitutional barrier to regulation in any other factual context. Yet the Court's discussion in *Frisby* indicates that limitations on picketing located solely in front of a particular residence were never meant to establish the outer constitutional boundary in this area. Instead, the Court

appears to have endorsed the constitutionality of regulation that is carefully designed to advance the compelling state interest in preventing the imposition of a captive audience in the home. *See, e.g.*, 487 U.S. at 484 ("'the State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society'") (quoting *Carey v. Brown*, 447 U.S. 455, 471 (1980)).

In *Frisby*, for example, the Court offered a definition of "picketing" that extends beyond "picketing taking place solely in front of a particular residence," and includes also "having the picket proceed on a definite course or route in front of a home," as long as the picketing is "directed at a single residence." 487 U.S. at 483. The Court explained this definition in terms of the proper countervailing interest in protecting residential privacy, noting that an "important aspect of residential privacy is protection of the unwilling listener." *Id.* at 484. Thus, the Court emphasized, "a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions," which is why "we have been careful to acknowledge that unwilling listeners may be protected when within their own homes." *Id.* at 484-85.

The problem that has arisen in subsequent cases is that residential picketers have adapted their activities to avoid conflict with the narrowest possible reading of *Frisby*, but continue to engage in conduct that implicates the core concerns articulated by the Court in that case. In this case, for example, as the District Court explicitly found, the picketing activity "consisted of slow marching" that constituted "the functional equivalent" of a "siege" of the targeted residence. App. at B-10;11 [830 F. Supp. at 1081]. "At virtually any given moment, one or more of

the plaintiffs was in front of the doctor's house. . . . The doctor and his family were, in effect, trapped, unwilling recipients of plaintiffs' speech." App. at B-11 [830 F. Supp. at 1081). On these facts, the panel majority concluded, based on the narrowest possible reading of *Frisby*, that any municipal regulation of this activity would be unconstitutional. By this means, the Court's holding in *Frisby* is rendered impotent to address and control the central concerns that animated the Court's decision in that case.

These difficulties that have surfaced in the case law since *Frisby* have not gone unnoticed. As one commentator has summarized the problems:

> When the U.S. Supreme Court decided *Frisby* in 1988, it believed that it had struck [the balance between free speech rights and residential privacy interests] in a way that gave adequate protection to both interests -- freeing residents from the evils of picketing targeted at their homes while allowing protesters ample freedom to exercise their First Amendment rights. Subsequent history has proved the Court wrong. Finding the spirit of *Frisby*, if not the exact letter, easily evaded, protestors have continued to invade residents' privacy by merely extending the length of their picket lines. Ultimately, the balance struck in *Frisby* was no balance at all . . . .

Hazel A. Landwehr, *Unfriendly Persuasion: Enjoining Residential Picketing*, 43 Duke L.J. 148, 150 (1993).

The decision below also demonstrates that the Court's brief treatment in *Madsen* of a 300-foot barrier to residential picketing around the residences of the health clinic's employees offers no legitimate prospect of resolving the issue without further treatment by this Court. Indeed, the panel majority and the dissenting judge both concluded that the tangential discussion of this issue in *Madsen* bolstered their mutually exclusive approaches. The panel majority believed that its position was reinforced by *Madsen*, which "makes it clear that any linear extension beyond the area 'solely in front of a particular residence' is at best suspect, if not prohibited outright." App. at A-14 [43 F.3d at 1105] (quoting *Madsen*, 114 S. Ct. at 2530). The dissenting judge read *Madsen* as supportive of his contradictory position. *See* App. at A-28 [43 F.3d at 1111] (Martin, J., dissenting) (the "three-house zone provided for here is no more burdensome than necessary to protect the significant governmental interest in protecting residential privacy. [*Madsen*, 114 S. Ct.] at 2524."). *See also Madsen*, 114 S. Ct. at 2533 (Stevens, J., concurring in part and dissenting in part)(First Amendment protection "does not encompass attempts to abuse an unreceptive or captive audience").

In fact, *Madsen* can be read to provide support for both of these incompatible approaches. On the one hand, the Court in *Madsen* struck down a 300-foot zone of protection around the residences of the clinic staff as unconstitutionally broad. 114 S. Ct. at 2530. On the other hand, the Court upheld a 30-foot zone of protection around the entrance to the clinic, as "a means of protecting unfettered ingress to and egress from" the property, *id.* at 2527, which is one of the concerns stated by the District Court in this case, *see* App. at B-13 [830 F. Supp. at 1082] (limited zone of protection would "allow the doctor and his family to come to and go from their home"). In addition,

if the Court favored the narrow reading of *Frisby* adopted by the panel majority in this case, then its suggestion in *Madsen* that "a smaller zone" of protection could be permissible (as contrasted with the 300-foot zone imposed by court order) would have been misleading and coy. *Id.* at 2530. If the only constitutionally permissible zone is the area located directly in front of a particular residence, then the Court likely would have said so in *Madsen*.[2]

Clarification of *Frisby* is thus necessary to prevent the Court's holding in that case from becoming irrelevant to the Court's stated rationale for its holding. The importance of the issue has also grown as residential picketing has become an increasingly popular form of protest. Some of the more traditional fora have disappeared, *see, e.g., Hudgens v. NLRB*, 424 U.S. 507 (1976)(shopping center differs from town square, and First Amendment rights of individuals do not extend to such privately owned property), and alternative fora often are less amenable to the direct provocation and confrontation that may be the true aim of this activity, *see, e.g., Town of Barrington v. Blake*, 568 A.2d 1015, 1021 (R.I. 1990)(noting that abortion clinic location would be "generally a more effective forum to disseminate their views, unless the picketers' objective is only to harass or intimidate an individual"). As the amount of residential picketing increases, continued misinterpretation of *Frisby* is likely to thwart or at least distort legislative efforts by municipalities, the conduct of law enforcement officers, and the judicial analysis employed by

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[2] The panel majority also misread *Madsen* in another important respect: despite the greater deference that *Madsen* dictates be applied to an ordinance in contrast to an injunction, the City's ordinance was subjected to stricter review than the District Court's injunction. *See* App. at A-17 [43 F.3d at 1107].

the lower courts. For these reasons, the Court should grant review in this case.

II. THIS COURT SHOULD GRANT THE WRIT TO RESOLVE A CONFLICT IN THE LOWER COURTS OVER THE PROPER APPLICATION OF *FRISBY* TO RESIDENTIAL PICKETING THAT CREATES A CAPTIVE AUDIENCE.

According to the panel majority in this case, "'only focused picketing taking place *solely* in front of a particular residence'" is properly subject to regulation consistent with the First Amendment. App. at A-17 [43 F.3d at 1107] (quoting *Frisby*, 487 U.S. at 483)(emphasis added by the panel majority). This approach rests on the narrowest possible reading of *Frisby*, and thus threatens most substantially to decouple the holding in *Frisby* from the rationale for that holding as articulated by the Court. In the wake of the ruling below, the panel majority's crabbed reading of *Frisby* has also been adopted and applied in the same fashion to limit the regulation of picketing that was conducted in front of the residence of accused Nazi war criminal John Demjanjuk. *City of Seven Hills v. Aryan Nations*, 1995 WL 66679 (Ohio App. 1995)(invalidating municipal ordinance regulating residential picketing).[3]

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[3] Before the ruling below was issued, the Ohio courts had understood *Frisby* to allow much more robust regulation of residential picketing. *See, e.g., Dayton Women's Health Center v. Enix*, 587 N.E.2d 121 (App.) (enjoining picketing within viewing distance of clinic staff's residences), *appeal dism.*, 583 N.E.2d 971 (Ohio 1991), *cert. denied sub nom. Sorrell v. Dayton Women's Health Center, Inc.*, 112 S. Ct. 3033 (1992).

In contrast, other lower court decisions have applied *Frisby* to allow much greater regulation of residential picketing, at least where such regulation is necessary to avoid imposition of a captive audience in the home. These decisions approve a "bright-line" approach that directly conflicts with the ruling below in this case, which struck down a very limited "picket-free" zone that the trial court had established to safeguard the residential privacy of the targeted doctor and his family in their home. An excellent example of this second class of cases is *Murray v. Lawson*, 138 N.J. 206, 649 A.2d 1253 (N.J. 1994), *cert. filed*, No. 94-1450 (U.S., Mar. 1, 1995), where the New Jersey Supreme Court determined -- as in this case -- that, though the picketers marched a route in front of a number of houses, "at no time was the area in front of plaintiffs' house free from picketers. Thus, injunctive relief is necessary here to protect plaintiffs from being 'under siege' by defendants." *Id.* at 228, 649 A.2d at 1265. Initially, the trial court had issued an order barring picketing within 300 feet of the targeted residence, which the New Jersey Supreme Court upheld on appeal. After this Court vacated and remanded for further consideration in light of *Madsen*, the New Jersey Supreme Court imposed a 100-foot zone around the residence in which no residential picketing could occur. Significantly, that court read *Madsen*, as did the dissenting judge in this case, as not preventing lower courts from imposing "a smaller picket-free zone" of less than 300 feet surrounding a targeted residence when such relief is warranted by the facts surrounding the residential picketing. *Id.* at 233-34, 649 A.2d at 1267-68.

An even broader reading was given to *Frisby* and *Madsen* in *City of San Jose v. Superior Court*, 32 Cal. App.4th 330, 38 Cal. Rptr.2d 205 (1995). There the court considered the constitutionality of an ordinance that barred residential picketing within 300 feet of the targeted resi-

dence. Although an injunctive order of this precise measure had been invalidated in *Madsen*, the court noted that *Madsen* had also held that less stringent constitutional review would be appropriate for a "content-neutral, generally applicable statute." *Madsen,* 114 S. Ct. at 2524-25. The court thus applied a different standard of review to uphold the challenged ordinance, concluding that it was a valid means both of assuring ingress and egress and of preventing a "captive audience" situation. *Cf. Kaplan v. Prolife Action League*, 111 N.C. App. 1, 431 S.E.2d 838 (1993)(300-foot protected zone established by preliminary injunction upheld on appeal), *cert. denied sub nom. Winfield v. Kaplan*, 114 S. Ct. 2783 (1994); *see also id.* (Scalia, Kennedy, and Thomas, JJ., dissenting from denial of certiorari in the wake of the Court's *Madsen* decision); *Northeast Women's Center, Inc. v. McMonagle*, 939 F.2d 57, 67 (3d Cir. 1991)(*Frisby* construed to permit zone tailored to circumstances).

Finally, yet another approach to the regulation of residential picketing was adopted in *Welsh v. Johnson*, 508 N.W.2d 212 (Minn. App. 1993). This decision embodies a more functional and fact-specific approach to regulation of residential picketing, which gauges the particular geographical layout in an attempt to balance the interest of "the household" in privacy against the interest of "the public" in free speech. In *Welsh*, the court entered an order restricting picketing within two blocks of the targeted residence, which was upheld on appeal because "the trial judge's knowledge of the configuration of streets in this rather secluded neighborhood rendered the limitation within the court's discretion." *Id.* at 216. That more fact-specific approach is akin to the initial order entered by the District Court in this case, which allowed for conditional enforcement of the City's ordinance.

The Court should grant review here and harmonize these distinct approaches by adopting a uniform standard to govern the permissible regulation of residential picketing. The lower courts have been reading *Frisby* inconsistently, and now are reading *Madsen* inconsistently. These distinct views about the Court's holdings simply add to the difficulty of applying constitutional principles in these cases to residential picketers who already present a moving target, as they seek to tailor their conduct to the narrowest possible readings of the Court's opinions. The First Amendment should not be interpreted in one jurisdiction to prohibit appropriate protection of residential privacy while being interpreted in other jurisdictions to permit that protection. The extent of the police power that is exercised in different jurisdictions should not vary based on inconsistent judicial interpretations of this Court's precedents.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 12, 1995

Decided and Filed January 12, 1995
[43 F.3d 1100]

Nos. 93-4034/4086

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES VITTITOW, et al.,	)	
	)	
Plaintiffs-Appellants, Cross-Appellees,	)	
	)	
v.	)	ON APPEAL from the
	)	United States District
CITY OF UPPER ARLINGTON, et al.,	)	Court for the Southern
	)	District of Ohio
	)	
Defendants-Appellees, Cross-Appellants.	)	

[1101] **BEFORE:** KENNEDY, MARTIN and GUY, Circuit Judges.

GUY, J., delivered the opinion of this court, in which KENNEDY, J., joined. MARTIN, J. (pp. 17-28), delivered a separate dissenting opinion.

RALPH B. GUY, JR., Circuit Judge. Plaintiffs brought this action against defendant, the City of Upper Arlington, alleging that the City's enforcement of an ordinance banning residential picketing violated their First Amendment rights. After issuing a preliminary injunction prohibiting enforcement of the ordinance as written, the district court modified its injunction to prohibit residential picketing in front of a targeted home as well as the two

homes on either side of the targeted home. Both the plaintiffs and the City appeal the court's modified injunction. We reverse and remand.

I.

Plaintiffs are anti-abortion activists who reside in Dayton, Ohio. In addition to employing various other tactics, plaintiffs support their cause by means of residential picketing. Plaintiffs engage in such picketing "in order to bring their message to the community and to call the abortionist to repentance and to change what he does for a living for the sake of the preborn babies."

In 1991, plaintiffs began a picketing campaign that had as its target Raymond Robinson, a doctor who lives in Upper Arlington and performs abortions in Dayton. Robinson's house is on a cul-de-sac that is approximately 465 feet from one end to the other. There are only a few other houses on the same cul-de-sac.

After their initial visit in 1991, plaintiffs again travelled to Robinson's neighborhood in April 1992. Plaintiffs made numerous passes back and forth in front of four houses, including Robinson's house. Plaintiffs were then confronted by officers of the Upper Arlington Police Department (UAPD), who ordered plaintiffs to cease picketing. After plaintiffs ignored the order, plaintiffs James and Marisa Vittitow were "arrested" and detained in separate police vehicles. The Vittitows were released after the other picketers agreed to leave the area.

In August 1992, the Upper Arlington City Council responded to citizens' complaints regarding residential picketing by revising section 517.17 of the City's codified ordinances to read: "No person shall engage in picketing before or about the residence or dwelling of any individual in this City."

Plaintiffs returned to Upper Arlington in October 1992.[1] Although the group, which numbered roughly 20,[2] traversed the entire cul-de-sac, they paid particular attention to the area in front of Robinson's house. The picketers spread themselves out and moved slowly, but as Glen Willer, A UAPD detective, explained, "once they got to the front of Dr. Robinson's house, the line appeared to compress to some degree." Willer added: "They slowed to a very slow pace [in front of Robinson's home], but however, I wouldn't describe it as having stopped."

[1102]A police report prepared by UAPD Sergeant Dwight Holcomb recounted:

> Dispatched to the area on a report of picketers in the area. On arrival found approx. 20 people with signs concerning abortion. Some signs were directed to the resident

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[1] This visit was publicized via the following recorded message on Dayton Pro-Life Action Line:

> Hi. Thanks for calling the Dayton Pro-Life Action Line. Well, I want to let you know you right away that there is a picket this Saturday, October 3rd, there in Columbus outside the office or home of abortionist Raymond Robinson. He is the abortionist who comes to Dayton and does abortions at 1829 North Main Street.

Although James Vittitow denied having recorded the message himself, he did admit to having heard the message prior to embarking on the October trip to Upper Arlington. Vittitow further admitted that he knew the woman who had recorded the message -- a woman he identified as Dawn Thomas -- and that he had associated with her in the past "doing pro-life activities."

[2] Approximately 12 had participated in the April 1992 demonstration.

who lives at 4556 Benderton Court. The protesters were on the Court and walking directly [in front] of the above address. The protesters were spread out over a distance of approx 200 feet and continued to walkaround the court. A person identified as the group leader and I had a conversation concerning the matter and that I felt there was probable cause to believe a crime was being committed. After a short discussion on the matter, the gentleman took his group and removed them from the court. They continued their march down Rosebury Dr. to Crompton, then came back to their autos. The subjects left the area without incident at 14:20 hours.[3]

---

[3] Holcomb explained how he arrived at his probable cause determination:

> I looked at the totality of everything that I knew at the time, the history for Dr. Robinson's home, the history for 4556 Benderton Court.
>
> I looked at the information that we had, that we suspected on Saturday, October 3 of 1992 that a group would appear. We had the tape recording that we had monitored that was recruiting people to come to Upper Arlington and to specifically to Dr. Robinson's home.
>
> On my arrival, I observed signs, specifically, talking about Dr. Robinson's house by address and by his name, and the group was compacted on Benderton Court, which is a very small court. . . .
>
> Looking at the entire amount of information that I had, at that time, I felt that the group was targeting and focusing on Dr. Robinson's home.

Once plaintiffs left the cul-de-sac, the protest proceeded without incident. Plaintiffs continued to march for approximately 35 minutes, during which only one UAPD officer, Holcomb, stayed at the scene.

Plaintiffs initiated this action on October 29, 1992, seeking declaratory and injunctive relief. In their complaint, plaintiffs claimed that section 517.17, as interpreted and enforced by the City of Upper Arlington, violated their constitutional rights to free speech and assembly on residential streets and sidewalks. In addition, plaintiffs filed a motion for a temporary restraining order or a preliminary injunction. After a hearing was held on plaintiffs' motion, the district court issued an order preliminarily enjoining the City from enforcing the ordinance as written. The court's order, however, did provide for conditional enforcement:

> Enforcement of the ordinance is subject to the following:
>
> 1) Picketers shall continue moving at all times and shall not stop or gather in front of or around any residence;
>
> 2) Picketers shall not give undue emphasis to directing their activities to one residence;
>
> 3) The presence or absence of signs, banners, etc. shall not in any way diminish or enhance the activities of the picketers;
>
> 4) Picketers shall at all times be mindful of the legitimate and compelling interest of the City of Upper Arlington to maintain traffic and safety -- particularly as it applies to children. Picketers are directed to obey any

> legitimate orders of the police concerning the safety of those in the area being picketed.
>
> 5) The City of Upper Arlington shall adopt, issue and post appropriate written authority to comply with this Order within thirty (30) days of the issuance of the Court's pending Opinion and Order.

In issuing its order, the district court noted that a comprehensive order and opinion would be forthcoming. Apparently, the process of crafting an opinion caused the court to rethink its earlier position somewhat. In its opinion, the court explained: "Upon further review of the preliminary injunction, the Court finds that the interests of justice require that the order be *sua sponte* modified." *Vittitow v. City of Upper Arlington*, 830 F. Supp. 1077, 1078 (S.D. Ohio 1993). This modified version stated as follows:[1103]

> 1. Defendants may not prevent plaintiffs from picketing in any particular residential neighborhood, street, or cul-de-sac.
>
> 2. Defendants may, however, properly prevent plaintiffs from picketing in front of: (a) the doctor's home, and (b) the two homes on either side of the doctor's home.
>
> 3. Similarly, defendants may properly prevent plaintiffs or others from picketing in front of: (a) the home of anyone defendants have probable cause to believe is the target, focus or subject of the

picketing, as well as (b) the two homes on either side of the home just described.

Id. at 1083.[4]

Both parties appeal this later injunction.

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[4] The district court shed light on what changed its mind:

> Without the luxury of having constitutional scholars accompany them on their assignments, the police officers must make virtually instantaneous, on-the-spot decisions as to whether particular conduct is protected First Amendment expression, or a violation of the ordinance for which a person may properly be arrested. Such decisions are difficult for judges and lawyers even when they have had time to reflect on them, and reasonable judges and lawyers do not even agree on the correct answer.
>
> These real life circumstances have led the Court to modify its original preliminary injunction. The original injunction in this case requires the parties to evaluate such subjective criteria as to whether plaintiffs have significantly slowed down in front of the doctor's house, or whether plaintiffs have given a particular residence undue emphasis. These standards are simply unworkable.
>
> The Court finds that application of a bright line standard will best serve the competing interests involved. . . . This bright line zone of residential privacy is designed to protect plaintiffs' right to free speech as well as defendants' equally significant interest in protecting residential privacy. Moreover, this rule will allow law enforcement officers easily to determine whether a violation of the ordinance has occurred. In the same way, the bright line rule will also allow plaintiffs to comply with the law, as they say they have always intended to do.

830 F. Supp. 1081-82 (footnotes omitted).

II.

Plaintiffs first contend that the district court's modified injunction is content-based and that therefore the injunction must be reversed under a strict scrutiny standard. With respect to plaintiffs' premise, the Supreme Court's recent decision in *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994), is instructive. In *Madsen*, a group of anti-abortion protesters were enjoined by a Florida state court from interfering with public access to an abortion clinic and from physically abusing people attempting to enter or exit the clinic. Six months after the clinic had obtained this injunction, it successfully sought to broaden the injunction, arguing that the protesters had persisted in blocking access to the clinic. The Florida Supreme Court subsequently upheld the modified injunction. Finding the injunction to be content-based, however, the Eleventh Circuit invalidated the injunction. The Eleventh Circuit concluded "that the asserted interests in public safety and order were already protected by other applicable laws and that these interests could be protected adequately without infringing upon the First Amendment rights of others." *Id.* at 2523.

The *Madsen* Court took issue with the Eleventh Circuit's conclusion that the injunction was content-based. The Court observed:

> To accept petitioners' claim [that the injunction is content or viewpoint based] would be to classify virtually every injunction as content or viewpoint based. An injunction, by its very nature, applies only to a particular group (or individuals) and regulates the activities, and perhaps the speech, of that

group. It does so, however, because of the group's past actions in the context of a specific dispute between real parties. The parties seeking the injunction assert a violation of their rights; the court hearing the action is charged with fashioning a remedy for a specific deprivation, not with the drafting of a statute addressed to the general public.

The fact that the injunction in the present case did not prohibit activities of those demonstrating in favor of abortion is justly attributable to the lack of any similar demonstrations by those in favor of abortion,[1104] and of any consequent request that their demonstrations be regulated by injunction. There is no suggestion in this record that Florida law would not equally restrain similar conduct directed at a target having nothing to do with abortion; none of the restrictions imposed by the court were directed at the contents of petitioner's message.

Our principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech "without reference to the content of the regulated speech." We thus look to the government's purpose as the threshold consideration. Here, the state court imposed restrictions on petitioners incidental to their antiabortion message because they repeatedly violated the court's original order. That petitioners all share the same viewpoint regarding abortion does not in itself demonstrate that some

> invidious content- or viewpoint-based purpose motivated the issuance of the order. It suggests only that those in the group *whose conduct* violated the court's order happen to share the same opinion regarding abortions being performed at the clinic. In short, the fact that the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based.

Id. at 2523-24 (citations omitted).

The language in *Madsen* applies with equal force in this case. Here, too, "none of the restrictions imposed by the court were directed at the contents of [plaintiffs'] message." The injunction (as well as the ordinance) seeks to regulate not plaintiffs' message, but rather the means by which plaintiffs seek to convey their message. That plaintiffs are anti-abortion activists, as opposed to union or environmental activists, is immaterial. So long as they focus their picketing effort on the residence of a particular individual, they are subject to prosecution. *Cf. Ater v. Armstrong*, 961 F.2d 1224, 1227 (6th Cir.)(restriction at issue deemed content-neutral because it "applies evenhandedly to all those who wish to distribute written materials or solicit funds"), *cert. denied*, 113 S. Ct. 493 (1992).

Because we reject plaintiffs' premise that the modified injunction is content-based, we do not subject the injunction in dispute to strict scrutiny analysis. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)("[Under strict scrutiny analysis, f]or the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."); *see also id.* ("[Under intermediate scrutiny analysis, t]he State

may . . . enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."). Instead, we must abide by the standard the Supreme Court devised in *Madsen*. As the Court noted, "[W]hen evaluating a content-neutral injunction . . . *[w]e must ask instead whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest.*" 114 S. Ct. at 2525 (emphasis added).

Initially, we note that a significant government interest is, indeed, at stake in this case. As the Supreme Court has made clear:

> "The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society. Our prior decisions have often remarked on the unique nature of the home, "the last citadel of the tired, the weary, and the sick," and have recognized that "[p]reserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value."
>
> One important aspect of residential privacy is protection of the unwilling listener. Although in many locations, we expect individuals simply to avoid speech they do not want to hear, the home is different. "That we are often 'captives' outside the sanctuary of the home and subject to ob[1105]jectionable speech . . . does not

mean we must be captives everywhere." Instead, a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom.

Frisby v. Schultz, 487 U.S. 474, 484-85 (1988)(citations omitted).

Having determined the existence of a significant government interest, we now consider whether the challenged provisions burden no more speech than is necessary to serve that interest. Plaintiffs would have us answer this question in the negative. They contend that the district court's modified injunction would 'allow[] the City to arrest and prosecute individuals for doing little more than walking down a city sidewalk."

Two cases in particular inform our analysis of this issue. First, in *Frisby*, a group of anti-abortion activists challenged a Brookfield, Wisconsin, ordinance that, like the Upper Arlington ordinance discussed above, prohibited residential picketing. Specifically, the ordinance provided: "It is unlawful for any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Brookfield." 487 U.S. at 477. In upholding the ordinance, the Court, unlike the lower courts, construed it narrowly to avoid constitutional difficulties.[5] Under the Court's reading, "to fall within the scope of the ordinance the picketing must be directed at a single residence." *Id.* at 483. The Court added: "General marching through residential neighborhoods, or even walking a route in front

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[5] The lower courts read the ordinance as "banning 'all picketing in residential areas.'" 487 U.S. at 482.

of an entire block of houses, is not prohibited by this ordinance. Accordingly, we construe the ban to be a limited one; *only focused picketing taking place solely in front of a particular residence is prohibited. Id.* (citation omitted)(emphasis added).

In *Madsen*, the Court reviewed what it deemed to be a content-neutral injunction directed at the conduct of anti-abortion protesters. This injunction, like the district court's modified injunction here, established a zone of protection; the injunction prohibited the protesters from "picketing, demonstrating, or using sound amplification equipment within 300 feet of the residences of clinic staff." 114 S. Ct. at 2529. Although the Court acknowledged the significant state interest in protecting the "'well-being, tranquility, and privacy of the home,'" *id.* at 2530 (quoting *Frisby*, 487 U.S. at 484), it nevertheless struck down the 300-foot zone, ruling that it was excessive in scope. Hewing closely to its prior decision in *Frisby*, the Court observed:

> [T]he 300-foot zone around the residences in this case in much larger than the zone provided for in the ordinance which we approved in *Frisby*. . . . The prohibition [in *Frisby*] was limited to "focused picketing taking place solely in front of a particular residence." By contrast, the 300-foot zone would ban "[g]eneral marching through residential neighborhoods, or even walking a route in front of an entire block of houses."

Madsen, 114 S. Ct. at 2530 (citations omitted).

Madsen, however, makes it clear that any linear extension beyond the area "solely in front of a particular residence" is at best suspect, if not prohibited outright.[6]

The Court counseled in this regard: "[I]t appears that a limitation on the time, duration of picketing, and number of pickets outside a smaller zone could have accomplished the desired result." *Id.*

The City also takes issue with the bright-line standard adopted by the district court. The City maintains that "[p]rinciples of fed[1106]eralism dictate deference to the City of Upper Arlington's choice about how to enforce its laws." The City adds: "Absent a finding of fact or conclusion of law that good faith probable cause determinations are an unconstitutional way to enforce an ordinance prohibiting residential picketing, the District Court had no right to impose its enforcement mechanism on the City of Upper Arlington."

Although this argument is less than clear, we assume the City is saying that, if the ordinance is facially valid, whether its enforcement violates the Constitution will have to be decided on a case-by-case basis. We have no quarrel with this principle in the abstract, but, here, the court was faced with a videotape and testimony demonstrating how the City did enforce the ordinance. The record made in the district court indicates the City was enforcing this ordinance in a manner contrary to the teaching of *Madsen*.

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[6] We additionally note in this case that the court's injunction was vague as to the exact scope of the zone created. The parties could not agree, nor could we discern on our own, whether the protected zone was one house on each side of a targeted residence (a three-house zone) or two houses on each side of a targeted residence (a five-house zone).

III.

Although one resolution of the issues presented in this appeal simply would be to remand for reconsideration in light of *Madsen*, we elect not to take this approach.

The language of the ordinance adopted by the City of Upper Arlington is identical to that construed by the Supreme Court in *Frisby v. Schultz*, 487 U.S. 474 (1988). The ordinance construed by the Court in *Frisby* was unconstitutionally overbroad as written but was saved by the extraordinary measure of accepting counsel's representation at oral argument before the Supreme Court as to how the ordinance would be enforced. Although there is precedent for this approach, four Justices were highly critical of saving the ordinance by this device. In his dissent, Justice Stevens offered a simple and practical alternative:

> [I]t is a simple matter for the town to amend its ordinance and to limit the ban to conduct that unreasonably interferes with the privacy of the home and does not serve a reasonable communicative purpose.

487 U.S. at 499 (Stevens, J., dissenting).

Notwithstanding the procedure adopted in *Frisby*, we know of nothing that *requires* us to accept representations from the City's counsel under the circumstances presented here. To begin with, it is not at all clear what representations we received, if any. Second, it is not clear that counsel can bind either the legislative body of the City or its police department. And third, the record in this case demonstrates that the City's idea of what constitutes an enforcement procedure that does not offend the Constitution, conflicts with the *Madsen* holding.

Recently, in construing another municipal ordinance, Judge Martin wrote:

> It is well recognized that federal "courts do not rewrite statutes to create constitutionality." *Eubanks v. Wilkinson*, 937 F.2d 1118, 1122 (6th Cir. 1991). As this Court recently emphasized:
>
> > A federal court must always be aware of the federalism concerns that arise whenever it deals with state statutes. 'The principles of federalism forbid a federal appellate court to arrogate the power to rewrite a municipal ordinance.'
>
> *Id.* at 1125 (citation omitted). It would therefore be improper for this Court to supply limiting language for Akron's public indecency ordinance in order to preserve its constitutionality.

Triplett Grille, Inc. v. City of Akron, No. 93-3418, slip op. at 13-14 (6th Cir. Nov. 14, 1994).

The City enacted this ordinance long after the decision in *Frisby* was issued and should have been well aware of the pitfalls in attempting to enforce an ordinance worded this broadly. Common sense would dictate that the City build on what could be learned from *Frisby* and not adopt wording so questionable that a federal district judge, a divided Seventh Circuit Court of Appeals, and four Supreme Court Justices found it to be overbroad.

Finally, and most important, the videotape and the testimony in this case indicate how the City reads *Frisby* in

enforcing its ordinance. The videotape (Plaintiff's Exhibit H) demonstrates that the City's police view the ordinance as violated when they can discern one residence as being the target of picket[1107]ing. In our view, that is a misreading of *Frisby*. All picketing of this nature will have a target, otherwise it is not really picketing. *Frisby* could not be more clear: "[O]nly focused picketing *taking place solely in front of a particular residence* is prohibited." 487 U.S. at 483 (emphasis added).

The trial judge tried to save this ordinance with a one-size-fits-all injunction, but narrowing the ordinance, at least in the first instance, is the job of the City, not the trial judge. This is not a case where the target of the picketing has come to court seeking an injunction. In such a case, the trial judge rightfully undertakes to define the rights of the parties in an appropriately worded injunction, if an injunction is called for. Here, however, an ordinance was at issue. The City is right in this regard. *If* the ordinance passes muster, the City is entitled to enforce it. A plaintiff is not entitled to an advisory opinion as to how the ordinance might be enforced.

Since we find the complete ban on residential picketing mandated by the ordinance to be inconsistent with the most recent pronouncements of the Supreme Court, we reverse and remand with instructions to enter a permanent injunction barring enforcement of *this* ordinance *as written*. Obviously, we pass no judgment on what the City may come up with as a substitute.

REVERSED and **REMANDED**.

BOYCE F. MARTIN, JR., Circuit Judge, dissenting. Because I believe the majority has ignored the implications of the procedural posture of this case, I respectfully dissent.

This case comes to us on appeal by both parties from the district court's Opinion and Modified Preliminary Injunction Order. Needless to say, a preliminary injunction is an equitable remedy the purpose of which is to maintain the relative positions of the parties until proceedings on the merits can be conducted. *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981); *see also Southern Milk Sales, Inc. v. Martin*, 924 F.2d 98, 102 (6th Cir. 1991); *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985). A preliminary injunction hearing under Federal Rule of Civil Procedure 65 is not a proceeding *on the merits* unless the district court chooses to combine the hearing on the preliminary injunction with a hearing on the merits. As Federal Rule of Civil Procedure 65(a)(2) provides:

> Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

In *Camenisch*, the Supreme Court commented on the difference between a Rule 65 preliminary injunction

hearing and a Rule 65(a)(2) consolidated proceeding and the nature of the judicial task in each:

> [I]t is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits.
>
> Should an expedited decision on the merits be appropriate, Rule 65(a)(2) of the Federal Rules of Civil Procedure provides a means of securing one. That Rule permits a court to "order the trial of the action on the merits to be advanced and consolidated with the hearing of the application." Before such an order may issue, however, the courts have commonly required that "the parties should normally receive clear and unambiguous notice [of the court's intent to consolidated the trial and the hearing] either before the hearing commences or at a time which will still afford the parties a full opportunity to present their respective cases."

Camenisch, 451 U.S. at 395 (citations omitted).

In this case, the district court did not consolidate the proceedings pursuant to Rule [1108] 65(a)(2). It is clear from the record that the merits of this action have not been heard or decided. Indeed, as observed in *Camenisch*, any findings of fact or conclusions of law made by the district court for purposes of issuing a preliminary injunction are not binding on the parties or the court during subsequent proceedings on the merits. In fact, this Court has distinguished between findings of fact and conclusions of law made by a district court after a hearing on a

preliminary injunction and those made after a consolidated hearing.

> Although evidence received at a Rule 65(a) hearing may enter the trial record, the court's findings of fact and conclusions of law with regard to the preliminary injunction are not binding at trial. Based, as they usually are, on incomplete evidence and a relatively hurried consideration of the issues, these provisional decisions should not be used outside the context in which they originally were rendered. Consequently, it is inappropriate for the court at a Rule 65(a) hearing to make findings of fact or conclusions of law that go beyond what is necessary to decide whether a preliminary injunction should be issued.

Brown v. International Bhd. of Elec. Workers, Local Union No. 58 AFL-CIO, 936 F.2d 251, 256 (6th Cir.), *reh'g denied* (1991)(citing Wright, Miller, Federal Practice and Procedure § 2950, p. 494; *see also Mayo v. Lakeland Highlands Canning Co.*, 309 U.S. 310 (1940)). While the district court in this case may have had more evidence or more time to consider whether to issue the preliminary injunction than is usual, neither of these factors transforms the district court's findings or conclusions into final findings of fact or conclusions of law regarding the merits of the plaintiffs' complaint, absent consolidation under Rule 65(a)(2). Additionally, while the Supreme Court in *Camenisch* observed that "it is generally inappropriate for a federal court at the preliminary injunction stage to give a final judgment on the merits," thus allowing for the possibility that a district court might be able to issue a final

decision on the merits in a preliminary injunction hearing, the district court in this case did not do so.

To date, the district court has not conducted proceedings on the merits, including conducting a trial by jury, if necessary (and as plaintiffs have demanded). To date, the district court has not decided whether to grant declaratory relief regarding whether the defendants have unconstitutionally enforced Upper Arlington City Ordinance § 517.17, or whether this ordinance can be constitutionally enforced. To date, the district court has not had the opportunity to decide whether to issue a permanent injunction barring enforcement of this ordinance. We do not have a ruling before us from the district court on the merits and it is premature for us to pass on the merits before the district court has had the opportunity to do so. The limited task before this Court, therefore, is to review the district court's decision granting the preliminary injunction.

It is well-established that this Court reviews the decision of a district court to grant a preliminary injunction for abuse of discretion. *Washington v. Reno*, 35 F.3d 1093, 1098 (6th Cir. 1994); *Keweenaw Bay Indian Community v. Michigan*, 11 F.3d 1341, 1348 (6th Cir. 1993); *Basicomputer Corp. v. Scott*, 973 F.2d 507, 511 (6th Cir. 1992); *Forry, Inc. v. Neundorfer, Inc.*, 837 F.2d 259 (6th Cir. 1988). As we have said, the decision of a district court to grant a preliminary injunction is

> generally accorded a great deal of deference on appellate review and will only be disturbed if the court relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard.

Michigan Coalition v. Griepentrog, 945 F.2d 150, 153 (6th Cir. 1991)(citations omitted), *rev'd on other grounds*, 954 F.2d 1174 (6th Cir. 1992).

When a district court is asked to issue a preliminary injunction, it does not consider the merits of the case, but rather balances four factors in determining whether to issue the injunction. These well-established factors are:

> (1) the likelihood that the party seeking the preliminary injunction will succeed on the merits of the claim; [1109]
>
> (2) whether the party seeking the injunction will suffer irreparable harm without the grant of the extraordinary relief;
>
> (3) the probability that granting the injunction will cause substantial harm to others; and
>
> (4) whether the public interest is advanced by the issuance of the injunction.

Washington, 35 F.3d at 1099. This Court has said that these factors are not prerequisites to be met, but factors to be balanced. *In re DeLorean*, 755 F.2d at 1229. As to the first factor, the party requesting the injunction need not show a strong likelihood of success on the merits, nor a substantial likelihood of success, but must show that the merits of the case present a sufficiently serious question to justify further investigation of the merits. *Id.* at 1230.

When balancing these factors and deciding whether to issue a preliminary injunction, the Supreme Court has cautioned that a district court should decide only those issues which are presented to it and which are necessary to

determine whether to order a preliminary injunction. In *Mayo v. Lakeland Highlands Canning Co.*, the Supreme Court held that a district court committed serious error when it decided whether a state statute was constitutional on a motion for a preliminary injunction. 309 U.S. at 316. In *Mayo*, Florida citrus growers filed a complaint for temporary and final injunctive relief against enforcement of a Florida statute, the Growers' Cost Guarantee Act. The statute gave the Florida Commissioners of Agriculture emergency power to set the price paid for citrus fruit and a related statute provided that any "dealer" (including growers) could lose its license by violating the Act. The plaintiffs alleged that the statute violated several of their constitutional rights, including their Fifth and Fourteenth Amendment rights. During the preliminary injunction hearing, the Commissioner asked the district court to "pass on all questions presented, and especially on the constitutionality of the Act." *Id.* The district court found the Act to be unconstitutional, but issued the injunction for other reasons. The Supreme Court vacated the preliminary injunction and remanded, stating:

> We think the court committed serious error in dealing with this case upon motion for temporary injunction. The question before it was not whether the act was constitutional or unconstitutional; was not whether the Commission had complied with the requirements of the act, if valid, but whether the showing made raised serious questions, under the federal Constitution and the state law, and disclosed that enforcement of the act, pending final hearing, would inflict irreparable damages upon the complainants.

Id. In a paragraph that is less than clear, *Mayo* contains some language indicating that, where the parties argue the constitutionality of the statute in proceedings on a preliminary injunction, the district court may consider the issue. *Mayo*, 309 U.S. at 317. However, the Supreme Court concludes that, where the district court confines itself to the issue presented [the issuance of the preliminary injunction], the proper standard of review is abuse of discretion and only the findings of fact and conclusions of law actually made should be reviewed. *Id.*

In the present case, after reviewing the district court's findings and conclusions regarding the four factors it was required to balance, I find no clear error in the district court's findings and no abuse of discretion in its application of these four factors to the facts. Therefore, I would affirm its decision to grant the injunction. As to the first factor, the likelihood of success on the merits, the majority's opinion supports my view that we should affirm the district court. The majority has reached the merits of the central questions in this case--whether the ordinance was enforced in a constitutional manner and whether it is constitutional at all-- and has decided that the plaintiffs are likely to succeed on the merits. The majority should have stopped its analysis there and affirmed the district court as to the propriety of issuing the injunction, assuming they find no error in the district court's findings and conclusions on the other factors.

The final step of this Court's review of the preliminary injunction is a review of the scope of the injunction. The district court [1110] may abuse its discretion not only in determining whether to grant a preliminary injunction, but also in delineating the scope of that injunction. This is the crux of the parties' dispute--whether the three (or five) house buffer zone is constitutional under *Frisby v. Schultz*, 487 U.S. 474

(1988), and under a case decided since the parties briefed the issues, *Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516 (1994). Because the size of the buffer zone at issue here is unclear, I would construe the injunction as creating a three-house zone and would remand for the district court to clarify its order accordingly.

This Court's interpretation of *Frisby* will determine whether the scope of the present injunction is constitutional under *Frisby*. In *Frisby*, the Supreme Court was attempting to interpret a Brookfield, Wisconsin ordinance so as to avoid constitutional difficulties. In attempting to so interpret the Brookfield ordinance, the court did not set out to prescribe what a constitutional injunction might look like in every instance of focused residential picketing. Also, the opinion tried to balance the residential privacy interests of the homeowner with the First Amendment rights of the picketers who were, as here, engaged in focused, targeted picketing. It justified its decision by emphasizing the importance of protecting residential privacy, including the state's interest in protecting

> the well-being, tranquility, and privacy [of the home]. . . the unique nature of the home, "the last citadel of the tired, the weary, and the sick" . . .the one retreat to which men and women can repair to escape the tribulations of daily pursuits. . . [where they have the] ability to avoid intrusions. . .[and refuge for] the unwilling listener.

Frisby, 487 U.S. at 474, 484-85. Further, it observed "[t]hat [because] we are often 'captives' outside the sanctuary of the home and subject to objectionable speech

does not mean we must be captives everywhere." *Id.* at 484.

Focused, targeted picketing can infringe these privacy interests even when the picketers are not standing on the sidewalk adjacent to a person's property. The case before us presents a set of facts where the residential dweller's interests continue to be infringed by the picketers' activities. Thus, given the rationale in *Frisby* for balancing the constitutional rights involved, I do not interpret *Frisby* to mean that other forms of targeted, focused residential picketing, besides that taking place solely in front of one home, may not be banned. The court in *Frisby* said:

> Here, the picketing is narrowly directed at the household, not the public. The type of picketers banned by the Brookfield ordinance generally do not seek to disseminate a message to the general public, but to intrude upon the targeted resident, and to do so in an especially offensive way. Moreover, even if some such picketers have a broader communicative purpose, their activity nonetheless inherently and offensively intrudes on residential privacy. The devastating effect of targeted picketing on the quiet enjoyment of the home is beyond doubt:
>
> > "'To those inside. . .the home becomes something less than a home when and while the picketing. . .continue[s]...[The] tensions and pressures may be psychological, not physical,

> but they are not, for that reason, less inimical to family privacy and truly domestic tranquility.'"

Frisby, 487 U.S. at 486 (citing *Carey v. Brown*, 447 U.S. 455, 478 (1980)(Rehnquist, J., dissenting), *quoting Wauwatosa v. King*, 182 N.W.2d 530, 537 (Wis. 1971).

In *Frisby*, the Court also stated that "[t]he First Amendment permits the government to prohibit offensive speech as intrusive when the 'captive' audience cannot avoid the objectionable speech." *Id.* at 487. Thus, I believe that the picketers may be prevented from engaging in targeted picketing, even when their method of targeting includes slow marching, if their method of picketing continues to infringe on the privacy interests mentioned above, when, for example, the picketers create a situation where the target of the picket is a captive audience [1111] or whose residence is under siege. Merely because the plaintiffs chose to march slowly by other residences, as well as the targeted residence, does not insulate their activity from regulation. The targeted homeowner is as much a captive audience when picketers repeatedly march in front of a home as when they are standing still. The psychological injury and disturbance to the tranquility of the home are not reduced because the picketers are marching slowly. The district court properly sought to curb the undesirable effects of plaintiffs' targeted picketing by enjoining plaintiffs from entering a buffer zone around the targeted home and therefore I would affirm the scope of this injunction under *Frisby*.

Turning now to *Madsen*, an initial problem for me is whether we have a new test for determining the constitutionality of content-neutral injunctions. *Id.* at 2538 (Scalia, J., concurring in part and dissenting in part)("The

[majority] does not give this new standard a name, but perhaps we could call it intermediate-intermediate scrutiny. The difference between it and intermediate scrutiny. . .is frankly too subtle for me to describe"). The "intermediate-intermediate" test described in *Madsen* requires this Court to ask "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." *Madsen*, 114 S. Ct. at 2524. Because the *Madsen* test does not alter my analysis, I wonder if this is a "new" test for content-neutral injunctions.

In *Madsen*, the Supreme Court struck down a 300-foot buffer zone around the residences of abortion clinic staff because it is "much larger than the zone provided for in *Frisby*" and because the ban would include "general marching through residential neighborhoods, or even walking a route in front of an entire block of houses." *Id.* at 2529 (quoting *Frisby*, 487 U.S. at 483). First, I believe the *Madsen* Court incorrectly read *Frisby* as creating a "zone." *Frisby* did not create a "zone," but provided a constitutional construction of the ordinance at issue. *Frisby* prohibited focused picketing taking place *solely in front of a particular residence*. If *Frisby* created a "zone," we have no idea how large the "zone" is, i.e., how far back from the front of a house picketers must be, et cetera. Second, *Madsen* struck down a 300-foot zone on the facts of the case. The *Madsen* court stated that the record before it did not justify the 300-foot buffer zone and suggested that "a limitation on the time, duration of picketing, and number of pickets outside a smaller zone could have accomplished the desired result." *Id.* at 2529.

The three-house zone provided for here is no more burdensome than necessary to protect the significant governmental interest in protecting residential privacy. *Id.* at 2524. The plaintiffs may still march through the

neighborhood, on the cul-du-sac, and even in front of the target house (though at a distance). Based on the foregoing, I would affirm the district court's decision, finding that its three-house zone is constitutional in light of *Frisby* and *Madsen*. Under these facts, the three-house zone is justified and is no larger than necessary to prevent the targeted homeowner and his family from being captives and to protect their other residential privacy interests. The picketers have ample alternative means of communication, including the ability to continue their picket on the targeted homeowner's street. In fact, given the small size of the cul-du-sac, the district court may have been justified had it also limited the number of picketers who could picket on the cul-du-sac. *Id.* at 2529.

Finally, though *Madsen* approved a thirty-six foot buffer zone in that case, a buffer zone may not adequately protect the residential privacy interests in this case. Homeowners' privacy interests may not be adequately protected by a zone when invasion-like residential picketing occurs. In this case, the City of Upper Arlington received several complaints about the picketing, including complaints from "non-targeted" homeowners on the cul-du-sac. Some of those homeowners likely experienced a similar invasion of their privacy--were captive audiences to unwanted speech, maybe were hesitant to let their children go outside while [1112] so many strangers were on the sidewalks, were hesitant to go outside themselves, or drive their cars out their driveways because they might have an unpleasant or threatening encounter with one or more of the picketers. Therefore, had the district court limited the picketers to picketing at the end of the street, in my view such an injunction would have more equitably balanced the interests involved.

To resolve this case, this Court had to consider *Madsen* because the residential streets and sidewalks

involved are "traditional public fora." However, perhaps it is time for the Supreme Court to consider modifying its public forum analysis in the case of residential streets and sidewalks or, as Justice Stevens has intimated, consider some other analytical approach in cases involving First Amendment issues. *Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788, 833, 833 n.1 (1985) (Stevens, J., dissenting). Perhaps residential streets and sidewalks should be reclassified as a special type of forum because of the residential privacy interests involved. I wonder if the citizens who live on primarily residential streets ever considered these streets to be "traditional public fora" as described by the courts in this country. In many residential areas, especially subdivisions, the fee to the land underlying the streets and sidewalks may still be owned by adjacent property owners (and not the public) with a government body owning only an easement in trust for purposes of providing a public right-of-way. In many municipalities, the owner of land on which the sidewalk is located, and not the general taxpaying public, is responsible for the actual maintenance of the sidewalk, including the cost. These factors, plus the importance of residential privacy interests lead me to believe that it's time to reconsider whether all streets over which the public may travel are traditional public fora.

Based on the foregoing, I believe that the district court did not abuse its discretion in either issuing the preliminary injunction at issue or in determining its scope. Because I would affirm the district court, I now, respectfully, dissent.

Filed February 3, 1995

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

James Vittitow, et al.,

Plaintiffs,

-v-

Case No. C-2-92-991
JUDGE SMITH
Magistrate Judge King

City of Upper Arlington, et al.,

Defendants.

ORDER

This matter is before the Court on its own motion to clarify the record. Fed. R. Civ. P. 60(a). The Court issued a modified preliminary injunction in this case on August 9, 1993. Both sides in this dispute appealed the modified preliminary injunction.

This Court is aware that the Court of Appeals ruled in favor of plaintiffs and reversed this Court's August 19, 1993 preliminary injunction. This Court has not, however, received the Court of Appeals' mandate. The dissenting opinion in the Court of Appeals suggested that the matter be remanded to this Court to clarify whether the limited

zone of residential privacy is a three-house zone or a five-house zone.

The record is hereby corrected to reflect that the limited zone of residential privacy is a three-house zone.

IT IS SO ORDERED.

/s/

GEORGE C. SMITH, JUDGE
UNITED STATES DISTRICT COURT

Filed August 19, 1993
[830 F.Supp. 1077]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

James Vittitow, et al.,

Plaintiffs,

-v-

Case No. C-2-92-991
JUDGE SMITH
Magistrate Judge King

City of Upper Arlington, et al.,

Defendants.

OPINION AND MODIFIED PRELIMINARY INJUNCTION ORDER

[1078] On November 6, 1992, the Court issued a preliminary injunction in this case (Doc. 9). At the end of the preliminary injunction order, the Court indicated that it would issue a comprehensive opinion and order. What follows is the Court's comprehensive opinion and order addressing the preliminary injunction. Upon further review of the preliminary injunction, the Court finds that the interests of justice require that the order be sua sponte modified.

Plaintiffs, who oppose abortion, bring this action under 42 U.S.C. §1983. Plaintiffs picketed in the City of Upper Arlington in front of and near the home of a

physician who allegedly performs abortions. In the instant action, plaintiffs challenge defendants' application of a city ordinance that prohibits residential picketing. All plaintiffs assert deprivation of rights under the First and Fourteenth Amendments to the U.S. Constitution. Plaintiffs James and Marisa Vittitow additionally assert violation of their Fourth Amendment rights. Plaintiffs seek injunctive relief, monetary damages, and attorney's fees and costs.

I.

This action arises from plaintiffs' attempts to picket in front of and near the home of a physician who lives in a residential neighborhood in the City of Upper Arlington, Ohio. On April 4, 1992, plaintiffs traveled from Dayton, Ohio to Upper Arlington to picket in the doctor's neighborhood. Plaintiffs maintain that they intended to picket peacefully and lawfully. Plaintiffs parked their cars upon arriving at the neighborhood, gathered briefly, and proceeded to walk up and down the sidewalk, carrying signs expressing their anti-abortion sentiments and indicating their belief that the doctor performed abortions. The doctor lives on a small cul-de-sac.

Upper Arlington police officers confronted plaintiffs during the April 4, 1992 picketing and ordered plaintiffs to cease their activities. Plaintiffs maintain they were aware of a U.S. Supreme Court decision they believed allowed them to picket. They therefore refused to follow the officers' order. The officers then handcuffed plaintiffs James and Marisa Vittitow and detained them in separate police cruisers until the other picketers agreed to leave the area.

In response to citizens' complaints about residential picketing, the Upper Arlington City Council enacted a

revised version of [1079] Codified Ordinance §517.17 on August 24, 1992. Section 517.17 provides as follows:

> No person shall engage in picketing before or about the residence or dwelling of any individual in this City.

The Council enacted the ordinance because, "notwithstanding issues of free speech, people are entitled to privacy and sanctity of their own home."

Near the beginning of October 1992, the Dayton Pro-Life Action Line provided an audio-taped message to callers concerning the details of an abortion allegedly performed by the doctor. The message invited callers to leave their names and phone numbers so they could be contacted about a picket against the doctor that was to take place the following Saturday (October 3, 1992). Defendants' Exhibit 4.

Plaintiffs again traveled from Dayton, Ohio to Upper Arlington to picket in the doctor's neighborhood on October 3, 1992. The police report of Upper Arlington Police Sergeant Dwight A. Holcomb fairly summarizes what happened during the October 3 picket:

> Dispatched to the area on a report of picketers in the area. On arrival found approx. 20 people with signs concerning abortion. Some signs were directed to the resident who lives at 4556 Penderton Court. The protesters were on the court and walking directly in front of the above address. The protesters were spread out over a distance of approx. 200 feet and continued to walk around the court. A person identified as the group leader and I had a conversation

> concerning the matter and I felt there was probable cause to believe a crime was being committed. After a short discussion on the matter, the gentleman took his group and removed them from the court. They continued their march down Rosebury Dr. to Crompton, then came back to their autos. The subjects left the area without incident at 14:20 hours.

Defendants' Exhibit 3. Plaintiffs felt threatened with possible arrest by Sergeant Holcomb if they did not leave the cul-de-sac. The evidence, which includes a video tape of some of plaintiffs' picketing, reveals that plaintiffs picketed quietly; they did not use bullhorns or any other sound amplification devices. They did not chant or shout slogans.

Plaintiffs filed their complaint and motion for temporary restraining order or preliminary injunction on October 29, 1992. At the time of the filing, plaintiffs indicated they desired to continue their picketing in Upper Arlington. See, e.g., Complaint para. 20; Brief in Support of Motion for a Temporary Restraining Order or Alternatively a Preliminary Injunction at 4; Hearing Tr. at 20. Defendants filed a memorandum in opposition to plaintiffs' motion on November 5, 1992. The Court held a hearing on November 6, 1992 to consider plaintiffs' motion. The Court issued a preliminary injunction, without an opinion, on November 6, 1992.

II.

The standard for determining whether to issue a preliminary injunction or a temporary restraining order requires the Court to consider the following factors:

> (1) whether the moving party has a substantial probability of success on the merits; (2) whether irreparable injury will occur if the injunction is not issued; (3) whether the injunction will have a harmful effect on third parties; and (4) whether the public interest would be served by the injunction.

CSX Transportation, Inc. v. Tennessee State Board of Equalization, 964 F.2d 548, 556 (6th Cir. 1992). The four considerations are factors to be balanced; they are not prerequisites that must be met. In re DeLorean Motors Co., 755 F.2d 1223, 1229 (6th Cir. 1985).

III.

The Court will first examine whether there is a significant likelihood that plaintiffs will succeed on the merits.

A.

Both sides in this conflict recognize the significance to this case of the decision of the U.S. Supreme Court in Frisby v. Schultz, 487 U.S. 474 (1988). In Frisby, the plaintiffs picketed outside [1080] the Brookfield, Wisconsin residence of a doctor who apparently performed abortions. In response, the town of Brookfield enacted the following ban on all residential picketing:

> It is unlawful for any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Brookfield.

Faced with the threat of arrest and prosecution, the plaintiffs in Frisby filed an action in federal district court seeking declaratory and injunctive relief, and challenging the facial validity of the ordinance on First Amendment grounds.[1]

The district court in Frisby granted the plaintiffs' motion for a preliminary injunction, concluding that the ordinance was not narrowly tailored enough to restrict protected speech in a public forum. An en banc panel of the Seventh Circuit Court of Appeals affirmed. The U.S. Supreme Court reversed, holding that the ordinance was not facially invalid under the First Amendment. Frisby, 487 U.S. at 488.

The Court in Frisby concluded that the residential streets and sidewalks of Brookfield were traditional public fora. Id. at 481. The Court therefore reviewed the ordinance under the following standard:

> The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.

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[1] In contrast, plaintiffs in the instant case do not appear to challenge the facial validity of the Upper Arlington Ordinance. Rather, they challenge the manner in which defendants have applied it.

Id. (quoting Perry Education Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 45 (1983)).

The Court in Frisby reached the conclusion that the ordinance was narrowly tailored to serve a significant government interest by applying the principal that "statutes will be interpreted to avoid constitutional difficulties." Id. at 483. Specifically, the Court interpreted the statute to prohibit only picketing focused on, and taking place solely in front of, a particular residence.[2] Id. at 482.

The Court in Frisby also concluded that the ordinance served a significant government interest: the protection of residential privacy. Id. at 484. In doing so, the Court recognized the importance of the privacy of the home, and the legitimacy of protecting unwilling listeners. Id. The Court noted the devastating effects of picketing that intrudes upon residential privacy:

> To those inside . . . the home becomes something less than a home when and while the picketing continues. The tensions and

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[2] The Court also referred to limits mentioned during oral argument:

> [P]icketing would be having the picket proceed on a definite course or route in front of a home. The picket need not carry a sign, but in order to fall within the scope of the ordinance the picketing must be directed at a single residence. General marching through residential neighborhoods, or even walking a route in front of an entire block of houses, is not prohibited by this ordinance.

Frisby, 487 U.S. at 483 (cites omitted).

> pressures may be psychological, not physical, but they are not, for that reason, less inimical to family privacy and truly domestic tranquility.

Frisby, 487 U.S. at 486 (quotes, cites and extraneous punctuation omitted).

As stated above, in Frisby, unlike the instant case, the plaintiffs challenged the facial validity of the ordinance. This Court nevertheless finds the principles enunciated in Frisby to be highly instructive in the instant case. In particular, the limitations the Frisby court read into the Brookfield ordinance serve as a fair guide as to the extent to which defendants in the instant case may constitutionally enforce the Upper Arlington ordinance. With these principles in mind, the Court will proceed to examine whether in the instant case plaintiffs have demonstrated a substantial likelihood of success on the merits.

[1081]**B.**

The merits of this case boil down to whether plaintiffs' picketing, which consisted of slow marching around the sidewalks of the cul-de-sac on which the doctor's home is located, constituted "picketing focused on, taking place in front of, a particular residence". Frisby, 487 U.S. at 482. There can be no doubt that the doctor was the subject of plaintiffs' picketing. Plaintiffs' intention appears to have been to inform the doctor's neighbors of his activities, and if possible to persuade him to cease those activities. Some if not all of the signs they carried referred specifically to the doctor. In this sense, the doctor's home was the "focus," or, as defendants put it, the "target" of the picketing.

The Court's inquiry does not end here, however. The Court in Frisby also limited the ordinance to prohibit only "picketing taking place solely in front of a particular residence." Frisby, 487 U.S. at 483.

The picketers in Frisby do not appear to have been moving continuously while picketing. Rather, they assembled outside the doctor's home. See 487 U.S. at 476, 487. On the one hand, part of plaintiffs' picketing in the instant case took place in front of the doctor's home as each plaintiff, in turn, passed in front of it. On the other hand, plaintiff's continuously moving picket differs from the apparently static picketing described in Frisby, and was not, strictly speaking, "solely in front of a particular residence." Id. at 483 (emphasis added).

Nevertheless, the continuous line of picketers marching slowly around the small cul-de-sac and in front of the doctor's home in this case is the functional equivalent of the kind of siege described in Frisby that a governmental entity may properly proscribe. At virtually any given moment, one or more of the plaintiffs was in front of the doctor's house. As a result, it would have been nearly impossible for the doctor to leave his house, or back his car out of the driveway, without having to confront one or more of the plaintiffs. Looking out a front window, the doctor would, at any given moment, see one or more picketers on the sidewalk directly in front of his house. The doctor and his family were, in effect, trapped, unwilling recipients of plaintiffs' speech.

In short, the harm the doctor and his family experienced during plaintiffs' picketing rises to the level of harm resulting from the invasion of residential privacy described in Frisby. Hence, in the circumstances presented in this case, although defendants could not properly have prevented plaintiffs from picketing in the neighborhood, or

even on the small cul-de-sac, they could properly have prevented plaintiffs from walking in front of the doctor's house while picketing.

The instant case presents a very trying set of circumstances for all involved. The plaintiffs are faced with the difficulty of attempting to exercise their legitimate First Amendment rights without breaking the law. Defendant Upper Arlington is faced with the problem of trying to protect its citizens' equally legitimate rights to residential privacy. Between the two, and perhaps in the most difficult position, are the police defendants charged with enforcing the ordinance. Without the luxury of having constitutional scholars accompany them on their assignments, the police officers must make virtually instantaneous, on-the-spot decisions as to whether particular conduct is protected First Amendment expression, or a violation of the ordinance for which a person may properly be arrested. Such decisions are difficult for judges and lawyers even when they have had time to reflect on them, and reasonable judges and lawyers do not even agree on the correct answer.[3]

These real life circumstances have led the Court to modify its original preliminary injunction. The original injunction in this case requires the parties to evaluate such subjective criteria as whether plaintiffs have significantly slowed down in front of the doctor's house, or whether plaintiffs have given a particular residence undue emphasis. These standards are simply unworkable. [1082]

The Court finds that application of a bright line standard will best serve the competing interests involved. As in the original preliminary injunction, plaintiffs should be allowed to picket in the doctor's neighborhood and even

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[3] Viz the concurring and dissenting opinions in Frisby.

on the cul-de-sac. Defendants, however, may create a limited zone of residential privacy and prevent plaintiffs from picketing in front of: (a) the doctor's home; and (b) the two homes on either side of the doctor's home. This bright line zone of residential privacy is designed to protect plaintiffs' right to free speech as well as defendants' equally significant interest in protecting residential privacy. Moreover, this rule will allow law enforcement officers easily to determine whether a violation of the ordinance has occurred. In the same way, the bright line rule will also allow plaintiffs to comply with the law, as they say they have always intended to do.[4]

The inclusion of the immediate neighbors' houses within the zone of residential privacy is necessary to prevent the kind of siege described in Frisby, or its functional equivalent, from occurring.[5] This limitation will allow plaintiffs to disseminate their message in the neighborhood to listeners the Court cannot properly presume are unwilling. At the same time, the zone will, for example, allow the doctor and his family to come to and go from their home without having to directly confront

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[4] The Court recognizes that even this bright line rule may not address every conceivable kind of residential picketing. The rule assumes that plaintiffs will continue to picket as they have in the past: quietly and without the use of any sound amplification equipment, and that they will move continuously while picketing. The Court does not mean to suggest that the only way the ordinance can be constitutionally enforced is when someone intrudes upon the area described. In different circumstances, the limited zone of residential protection may have to be larger.

[5] Cf. Northeast Women's Center, Inc. v. McMonagle, 939 F.2d 57, 66-68 (3rd Cir. 1991)(holding that district court's 2500 foot radius zone of protection against targeted residential picketing was unwarranted in the absence of findings that unusual or extraordinary circumstances were present).

picketers. It will, in essence, prevent them from becoming a "captive" audience of plaintiffs' speech. See 487 U.S. at 487.

In sum, plaintiffs have demonstrated a strong likelihood of success to the extent they challenge defendants' attempt to exclude them entirely from the cul-de-sac on which the doctor lives. The Court will, however, modify the original preliminary injunction.

IV.

The Court must next consider whether irreparable harm will result if the injunction is not granted. A violation of a person's right to free speech protected by the First Amendment and the deprivation of the Fourth Amendment protection against unlawful arrest constitute irreparable harm. Elrod v. Burns, 427 U.S. 347, 373 (1976); Dombrowski v. Pfister, 380 U.S. 479, 486 (1965). The Court finds that future violations against plaintiffs are likely to occur in the absence of a preliminary injunction. This factor also weighs in favor of the granting of a preliminary injunction.

V.

The Court must also consider whether the injunction will have a harmful effect on third parties. The granting of an injunction will allow the picketing in the doctor's neighborhood to continue. Although the Court did not receive evidence on this issue, it is likely that the picketing, even under the modified preliminary injunction, may cause the doctor to feel uncomfortable or embarrassed. Nonetheless, the degree of harm the doctor may suffer does not rise to a level sufficient to warrant further curtailing plaintiffs' rights under the First Amendment. Overall, this

factor does not weigh against the granting of a preliminary injunction.

VI.

Lastly, the Court must determine whether an injunction would serve the public interest. This case presents competing public interests. On the one hand, the public has an [1083] interest in protecting residential privacy. On the other hand, the public also has an interest in preserving the right to free speech. The Court finds that in the particularly circumstances presented in this case, and under the modified preliminary injunction, the public interest in protecting free speech prevails. The final factor weighs in favor of granting an injunction.

VII.

Based on the above, and all the arguments and evidence presented to the Court, the Court **HOLDS** that plaintiffs' motion for a preliminary injunction is meritorious, and that plaintiffs are entitled to at least part of the relief they requested.

VIII.

The following provisions shall supersede the provisions stated in the Court's November 6, 1992 preliminary injunction:

The Court preliminarily **ENJOINS** defendants as follows:

1. Defendants may not prevent plaintiffs from picketing in any particular residential neighborhood, street, or cul-de-sac.

2. Defendants may, however, properly prevent plaintiffs from picketing in front of: (a) the doctor's home, and (b) the two homes on either side of the doctor's home.

3. Similarly, defendants may properly prevent plaintiffs or others from picketing in front of: (a) the home of anyone defendants have probable cause to believe is the target, focus or subject of the picketing, as well as (b) the two homes on either side of the home just described.

IT IS SO ORDERED.

/s/

GEORGE C. SMITH, JUDGE
UNITED STATES DISTRICT COURT

Filed November 6, 1992

UNITED STATES DISTRICT COURT
SOUTHERN OHIO DISTRICT
EASTERN DIVISION

James Vittitow, et al.,

Plaintiffs,

-v- **Case No. C-2-92-991**

City of Upper Arlington, Ohio, et al.,

Defendants.

PRELIMINARY INJUNCTION

This matter is properly before the Court[1] upon Plaintiff's Motion for a Temporary Restraining Order or Alternatively a Preliminary Injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure.

The Court has received and reviewed all briefs, pleadings and exhibits in this matter. In addition, the Court conducted an oral hearing on November 6, 1992.

Plaintiffs seek, inter alia, declaratory and injunctive relief based upon an alleged denial of the right to free

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[1] The Court finds jurisdiction in this matter pursuant to 28 U.S.C. §1343, 1331, 2201 and 2202, as well as the First and Fourteenth Amendments to the United States Constitution.

speech based upon the enforcement of a local ordinance restricting residential picketing in the City of Upper Arlington.

There are four factors to be considered in determining whether the grant or denial of a preliminary injunction was an abuse of discretion: (a) the likelihood of success on the merits of the action, (b) the irreparable harm which could result without the relief requested, (c) the impact on the public interest, (d) the possibility of substantial harm to others. L.P. Acquisition Co. v. Tyson, 772 F.2d 201 (6th Cir. 1985).

After considering the relevant facts and law, the Court concludes that the current method of enforcement[2] of Upper Arlington Ordinance §517.17 the plaintiffs have established a likelihood that the ordinance violates the plaintiff's right to freedom of speech guaranteed under the First Amendment to the United States Constitution.

The Court is mindful of the difficulties presented to even the most diligent and knowledgeable police officer confronted with interpreting the writings of the United States Supreme Court in Frisby v. Schultz, 487 U.S. 474, 101 L.Ed.2d 420, 108 S.Ct. 2495 (1988). Even having the benefit of the considerable resources available to this Court, decisions in matters such as these can be difficult. Requiring a police officer to properly and correctly interpret such a ruling, without detailed and well considered guidelines, places an undue burden upon the law enforcement community.

Accordingly, plaintiff's motion for preliminary injunction is hereby **GRANTED**. As a result, the defendant, City of Upper Arlington, is hereby **ENJOINED**

---

[2] The Court specifically finds that the ordinance is constitutional on its face pursuant to the ruling of the United States Supreme Court in Frisby v. Schultz, 487 U.S. 474, 101 L.Ed.2d 420, 108 S.Ct. 2495 (1988).

from enforcing the ordinance at issue here in a manner inconsistent with the provisions of this Order. Enforcement of the ordinance is subject to the following:

1) Picketers shall continue moving at all times and shall not stop or gather in front of or around any residence;

2) Picketers shall not give undue emphasis to directing their activities to one residence;

3) The presence or absence of signs, banners, etc. shall not in any way diminish or enhance the activities of the picketers;

4) Picketers shall at all times be mindful of the legitimate and compelling interest of the City of Upper Arlington to maintain traffic and safety -- particularly as it applies to children. Picketers are directed to obey any legitimate orders of the police concerning the safety of those in the area being picketed.

5) The City of Upper Arlington shall adopt, issue and post appropriate written authority to comply with this Order within thirty (30) days of the issuance of the Court's pending Opinion and Order.

The Court's comprehensive Opinion and Order shall be issued in the immediate future.

IT IS SO ORDERED.

/s/
GEORGE C. SMITH, JUDGE
UNITED STATES DISTRICT COURT

Supreme Court, U.S.
FILED
MAY 12 1995
OFFICE OF THE CLERK

No. 94-1675

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

CITY OF UPPER ARLINGTON, *et al.*,

Petitioners,

v.

JAMES VITTITOW, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED BY PETITIONERS

Whether regulation of picketing that creates a captive audience in the home is restricted by the First Amendment solely to picketing that occurs directly in front of a particular residence?

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No. 94-1675

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ON PETITION FOR A WRIT OF CERTIORARI TO
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FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

I. INTRODUCTION

Plaintiffs James Vittitow, Marisa Vittitow, Ken Hunley, Stephanie Hunley, Rick Knapshaefer, Carolyn Knapshaefer, Zoe Vankleek, Bob Skovgard, Vivian Skovgard, Paula Baker, Patty Hott, Mike Nestor, Allyse Kerns, Dorcey Stidham, Anita Stidham, and Richard W. Ulbrich (collectively "Respondents") hereby submit their Brief In

Opposition to the Petition for a Writ of Certiorari ("Petition") filed on or about April 11, 1995 by Defendants City of Upper Arlington, City Attorney Sharon H. Pfancoff, City Chief of Police Thomas J. Kulp, and City Manager Richard A. King (collectively "Petitioners").

Respondents received service of the Petition on April 12, 1995.

II. STATEMENT OF THE CASE

A. Procedural History

For purposes of this Brief In Opposition, Respondents concur with the procedural history set forth in the Petitioners' Statement of the Case.

B. Statement of Facts

The factual record in this case consists of some documentary evidence, a videotape of Respondents' picketing and discussions with city police on October 3, 1992, and the testimony of four witnesses[1] at the November 6, 1992 TRO/Preliminary Injunction hearing (hereinafter "TRO hearing"). Based upon that evidence, Respondents hereby modify and supplement Petitioners' statement of the facts as follows:

1. The City of Upper Arlington ("City") ordinance which was enforced against the Respondents prior to the filing of this action states: "No person shall engage in picketing before or about the residence or dwelling of any individual in this City." Prior to the issuance of the

---

[1] The witnesses at the TRO hearing were Respondent James Vittitow and three officials for the City of Upper Arlington: city attorney Sharon Pfancuff, city detective Glen Willer and city police Sergeant Dwight Holcomb.

injunction by the District Court, the City had promulgated no standards or guidelines for enforcement of the Ordinance.

2. As early as April 1992, Respondent James Vittitow was familiar with *Frisby v. Schultz* and visited (with Respondents) the City of Upper Arlington to picket in the residential neighborhood[2] of an abortionist named Dr. Robinson. However, city police interferred even when Respondents walked a route covering a number of residences. Respondents were instructed by city police that they were simply "not allowed in this neighborhood."

3. Desiring to return to the City of Upper Arlington in October, 1993, and to picket without police interference, Respondents sought guidance by having their counsel correspond twice with City authorities,[3] wherein specific mention was made of *Frisby v. Schultz* and to the City's lack of discernible guidelines. The City's response was limited to the assertions that it would "enforce the existing ordinance to the fullest, as called for by the Police Division procedures and prosecuted accordingly by the City Attorney's office," and that it was the City's policy "to abide in full by the United States Constitution in enforcing our laws."

---

[2] Respondents take issue with the assertion (Petition at p. 5) that Respondents picketed "the doctor's *residence*." The record in this case establishes very clearly that Respondents, by their actions and stated purposes, were picketing the doctor's *neighborhood*. This is a common semantical game played in post-*Frisby* residential picketing cases, but the distinction is significant.

[3] There are four letters in this record as stipulated exhibits to the TRO hearing: two from Respondents' counsel to City authorities, and two responses back to counsel from City authorities.

4. Assuming from the City's responses that they would be permitted to picket in accordance with *Frisby vs. Schultz*, Respondents travelled to Dr. Robinson's neighborhood on October 3, 1992 with a plan to cover a larger picketing route than during any previous visits. Respondents got out of their cars on Roseberry Drive and started walking up and down both sides of Benderton Court (Dr. Robinson's cul-de-sac, approximately 465 feet in length) and back onto Roseberry Drive, before going back down the cul-de-sac where Robinson lived. Respondents were silent and kept moving at all times. On the second time around the cul-de-sac, they were confronted by Upper Arlington police.

5. James Vittitow testified as to the Respondents' two-fold purpose in residential picketing:

> Q. And what is your purpose for residential picketing in Upper Arlington?
>
> A. Okay. We want to inform the community that—that by our presence there, that abortion is wrong. And, also, that in their community—that there is a man who makes his living taking the lives of preborn children.

6. Respondents' conduct and the City's enforcement standards (or lack thereof) were captured on videotape (Trial Exhibit H), which recorded the discussion between Vittitow and Sgt. Holcomb:

> Vittitow: How can we target his house when [inaudible] and we are following what the Supreme Court says as far as you don't stand in front of somebody's house but you can picket a neighborhood. We've been on this street, we've been on the other street, we've gone all the way down to the corner—like we're taking in a whole area. So we've been here for

about twenty minutes and we've only gone in front of his house once.

Holcomb: Okay.

Vittitow: I don't believe that is really focusing on anybody's house.

Holcomb: But I do need to advise you that we could feel that we have probable cause that you would be in violation of an Upper Arlington law. At this point, we would be asking that you cease your operations right here in this area. And we do ask you that you cease your operations at this time.

Vittitow: Okay. You don't want us to walk on this street. Can we walk on another street?

Holcomb: I want you to cease the operation picketing here for Dr. Robinson. As you well—as you said, the Supreme Court, you know what the ruling is—

Vittitow: Right. That we are allowed to picket a residential neighborhood and that the contents of signs are irrelevant, according to what the Supreme Court said.

Holcomb: That depends upon where you're targeting a particular area. But you could be in violation of an Upper Arlington law. And at this time, I have probable cause in watching you people walking by Dr. Robinson's house to believe that your group is in violation of that.

Vittitow: Okay. Even though they're walking in front of many other people's homes too?

Holcomb: At this particular time, I'm feeling that you would be in violation based upon the probable cause I have at this time that you would be targeting this particular home.

Vittitow: Okay. And what happens if we continue walking through the neighborhood and don't come back to this home?

Holcomb: You head on down the neighborhood, we'll address that here shortly. At this time I feel I have probable cause to believe that you are in violation of our law.

Vittitow: And will that result in our arrest, or are you saying you are going to talk to your superiors and then come back?

Holcomb: At this time I am asking that you cease and head on. We'll give you an opportune time to get back to your vehicles and everything, but what would happen, we would issue you a citation and a summons [inaudible] court.

Vittitow: Okay, so if we don't stop doing what we are doing right now, we're going to be either cited or arrested?

Holcomb: Most likely, just cited. At this time, we'll just issue citations to you if you continue.

* * * *

Vittitow: Now, you've witnessed us walking these other places too and you still think that is focusing on this one particular residence?

Holcomb: That would be correct. I feel at this point that anything back in this area for Benderton Court, for Dr. Robinson and the address that you have is focusing at this particular time on his home.

Vittitow: Even though we are covering many houses on this short street.

Holcomb: I have probable cause to believe that you're in violation of the law.

Vittitow: Okay. Alright. Well, we will leave and we leave in protest 'cause we don't feel we are violat-

> ing—we believe that we are within the guidelines of what the Supreme Court said as far as like, you do not focus on one house. . . .

7. At the TRO hearing, Sergeant Holcomb identified his "probable cause" factors as (a) a previous history of residential picketing at Dr. Robinson's home; (b) a recording from a telephone hotline in Dayon, Ohio stating that protestors would be going to Robinson's home on October 3; and (c) the fact that Dr. Robinson's name appeared on some of the picket signs; (d) Sgt. Holcomb's perception that when he arrived at the scene the protestors were all on the cul de sac and within a space of about 250 feet. Based upon these factors, Sergeant Holcomb concluded that he had probable cause that the protestors were "targeting" Robinson's home.

8. Upon cross examination, Sergeant Holcomb admitted that there was no evidence that Plaintiffs had done anything other than walk up and down the public sidewalks. He also admitted that he did not know who was responsible for the telephone hotline in Dayton, Ohio. Vittitow, on the other hand, expressly denied any responsibility for the message on the hotline.

9. Respondents take issue with Petitioners statement that after Respondents were ordered to abandon the cul-de-sac, they "were permitted to march through adjoining neighborhoods." (Petition at p. 5) Although they did do so briefly, they did so with uncertainty and at their own risk. Upon specific inquiry by Vittitow about picketing on other streets, Sgt. Holcomb would only say: "I will have to address that if you continue the operation down there." Consequently, Respondents were sufficiently chilled that they did not stay around to picket as long as they had planned. James Vittitow at the TRO hearing:

> Q. . . . Did you Picket as long as you wanted to that day?
>
> A. No.
>
> Q. Or as long as you had planned?
>
> A. Not really.
>
> Q. And why did you stop before you–before you planned?
>
> A. Well, even though we did go down the other streets without incidents, we were still uncertain about what our rights–what they were going to allow us to do. I felt increasingly uncomforable, and said, well, let's just go ahead and leave now.

10. Finally, Respondents respectfully suggest that other "findings" of the District Court are better characterized as assumptions, because there was no evidence to support them. For example, there was no testimony from the doctor or his family, and no evidence of any "harm" suffered by them. Therefore, when the District Court concluded that "[t]he doctor and his family were, in effect, trapped, unwilling recipients of plaintiffs' speech" (see Petition at Appendix B-11) it was speculating and generalizing in the absence of any evidentiary basis.

III. ARGUMENT: REASONS FOR DENYING THE WRIT

There are two reasons for denying the writ, both of which stem from the reality that this case has little to do with the constitutional arguments now being posed by the Petitioners.

First, the conduct of the Petitioners in this case was directly contrary to *Frisby v. Schultz*, 487 U.S. 474, 101 L.Ed.2d 420, 108 S.Ct. 2495 (1988), and did not raise

the question posed in the Petition. The City of Upper Arlington had no regulation(s) or guideline(s) in place during the events relevant to this case. Interestingly enough, *Frisby* all but invited municipalities to impose "reasonable time, place and manner restrictions" appropriately tailored to the "residential character" of streets, 487 U.S. at 481, but the City of Upper Arlington made no such effort. Having deliberately disregarded *Frisby* after Respondents raised the issue and attempted to ascertain the City's enforcement policy, Petitioners have proceeded to retain learned legal counsel to pose interesting hypothetical questions of this Court. Had Petitioners really wanted review of the constitutional parameters of the "Regulation of [Residential] Picketing" (Petition at page i), a good starting place would have been the establishment of a regulation in the first place. Quite to the contrary, Petitioners vested themselves with breath-taking (i.e., standardless) discretion which was so undefined that City officials were unable (or unwilling) to explain permissible picketing standards to citizens actively seeking guidance. Having been enjoined from such clearly unconstitutional and chilling conduct, Petitioners now want this Court to entertain hypothetical questions based upon regulations never adopted.

The second reason for denying the writ is that the conduct of the Respondents in this case was perfectly consistent with *Frisby* and does not require answers to the question posed in the Petition. In spite of the District Court's conclusion that Respondents' activities constituted "the functional equivalent" of a "siege" of the doctor's house (Petition at pp. 5, 12), the undisputed facts acknowledged by the District Court are that Respondents were quiet, used no sound amplification devices, and moved continuously. (See District Court's

Opinion and Modified Injunction: Petition at Appendix B-13, n.4). If this does not comply with *Frisby's* approval of "[g]eneral marching through residential neighborhoods [and] walking a route in front of an entire block of houses," 487 U.S. at 483, then *Frisby* is no longer good law.

The reality is that the conduct of Respondents in this case was significantly different from some types of impermissible conduct discussed in *Frisby*, where a large group of protestors gathered on the doctor's doorstep, 487 U.S. at 487. The conduct of Respondents was also different from the protests found in other cases cited in the Petition, cases wherein civil injunctions were issued, usually in the absence of any ordinance, against individual or groups found to have engaged in harassment or other wrongdoing. As the Sixth Circuit noted below, in such cases "the trial judge rightfully undertakes to define the rights of the parties in an appropriately worded injunction, if an injunction is called for." *Vittitow v. City of Upper Arlington*, 43 F.3d 1100, 1107. One such case was *Madsen v. Women's Health Center, Inc.*, ___ U.S. ___, 114 S.Ct. 2516, 129 L.Ed. 2d 593 (1994).

Because Respondents were picketing under a generally applicable ordinance, had engaged in no wrongdoing, sought to disseminate a message to the general public as well as to the individual doctor, and did not picket "solely in front of a particular residence," 487 U.S. at 483, most of the authority offered by Petitioners simply is not helpful here.

Finally, Respondents respectfully suggest that the only reason for this Court to grant the writ is to substantially modify the *Frisby* holding. Contrary to the best efforts of some litigants, municipalities and lower

court judges, there is really very little to be confused about in the aftermath of *Frisby*. Petitioners may not like *Frisby*, but the Sixth Circuit was correct when it stated below that *Frisby* "could not be more clear: '[O]nly focused picketing taking place solely in front of a particular residence is prohibited.'" *Vittitow v. City of Upper Arlington*, 43 F.3d 1100, 1107 (6th Cir. 1995).

Should the Court deem this case to be appropriate for review of the residential picketing issue, Respondents will look forward to posing some questions of their own:

1) On what basis does one "invade the home" by walking silently down the public sidewalk?

2) How can there be "unwilling listeners" to silent picketing?

3) Why is the resident who is the subject of the picket entitled to more protection than his neighbors?

4) If "bubble zones" may be enforced, as the District Court suggested, under generally applicable, content-neutral ordinances, who is to decide which citizens may enter the zones and which citizens may be banned from the zones?

5) How many residences can a single, solitary picket "put under siege" at the same time?

This exercise can go on forever, but Respondents suggest that it is best reserved for cases where the facts actually present such issues.

IV. CONCLUSION

For the foregoing reasons, Respondents respectfully request this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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No. 94-1675

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

CITY OF UPPER ARLINGTON, *et al.*,

Petitioners,

v.

JAMES VITTITOW, *et al.*,

Respondents,

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONERS

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QUESTION PRESENTED

WHETHER REGULATION OF PICKETING THAT CREATES A CAPTIVE AUDIENCE IN THE HOME IS RESTRICTED BY THE FIRST AMENDMENT SOLELY TO PICKETING THAT OCCURS DIRECTLY IN FRONT OF A PARTICULAR RESIDENCE?

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No. 94-1675

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

CITY OF UPPER ARLINGTON, *et al.*,

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JAMES VITTITOW, *et al.*,

Respondents,

REPLY BRIEF FOR PETITIONERS ON PETITION FOR A WRIT OF CERTIORARI

The most important reason why certiorari is warranted in this case is that the lower courts cannot be permitted to relegate *Frisby v. Schultz*, 487 U.S. 474 (1988), to precedential oblivion by drawing artificial distinctions that make no practical difference under the Court's rationale in *Frisby*. The vitality of that rationale is critical to local governments struggling to accommodate interests in freedom of expression and privacy in response

to imaginative and persistent tactics of invasive residential picketing. Lower courts should not be permitted to reduce *Frisby* to an insignificantly narrow legal principle.

The decision below cannot be dismissed as an aberration in this regard. Since the petition was filed in this case, the artificially narrow interpretation of *Frisby* rendered by the court below has been invoked to strike down a similar ordinance in similar circumstances, again based on the specious view that *Frisby* precludes regulation of residential picketing "beyond the area 'solely in front of a particular residence.'" *Kirkeby v. Furness*, 1995 WL 231112 (8th Cir. Apr. 20, 1995) (quoting *Vittitow v. City of Upper Arlington*, 43 F.3d 1100, 1105 (6th Cir. 1995) [Pet. App. at A-14]). A split panel of the Eighth Circuit wanly endorsed the approach taken by the court below to *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516, 129 L. Ed.2d 593 (1994), "We believe that this reading of *Madsen* is not obviously wrong, and, indeed, has much to recommend it." 1995 WL 231112, *2.[1] The panel majority, following the pattern of the court below, then reversed a trial court's contrary ruling.

Judge Gibson dissented in *Kirkeby*. He observed that the ordinance at issue "prohibited only targeted residential picketing and clearly defined such picketing" and, further, was a necessary measure "where the picketing is narrowly directed at the household and not the public."

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[1] One reason for the panel's paradoxical formulation may have been its recognition that "*Madsen* did not involve an ordinance, but an injunction, which the Supreme Court explicitly judged under a stricter standard." *Kirkeby*, *supra*, at *2. This distinction merits greater respect in the constitutional analysis and further demonstrates the need for this Court to clarify the impact of the combination of *Frisby* and *Madsen* on ordinances narrowly tailored to preserve residential privacy.

Kirkeby, *supra*, at *4 (Gibson, J., dissenting). Based on these premises, he stressed that the panel majority "errs grievously and ignores the strong policy interest in protecting residential privacy" that was articulated and vindicated in this Court's *Frisby* decision. *Id.*

Respondents' opposition to certiorari is significantly silent about what little would remain of *Frisby*'s holding were the decision below permitted to stand in disregard of that controlling precedent. To the contrary, Respondents bluntly contend that Petitioners "deliberately disregarded *Frisby*," Opp. at 9. Of course, the City of Upper Arlington adopted and enforced the very same residential picketing ordinance that this Court upheld against constitutional challenge in *Frisby* and did so in service of the very constitutional interest -- residential privacy -- that fueled the rationale in *Frisby*. Unless *Madsen* was intended to overrule, *sub silentio*, the balancing of interests in *Frisby*, the Court needs to grant review here to dispel an erroneous impression that some lower courts have drawn.

Respondents are also largely silent on another important point: the different approaches that the lower courts have taken on this issue. Those distinct positions and holdings have already been fully recounted, *see* Pet. at 16-19, and, augmented by the *Kirkeby* split decision, they cry out for harmonization by this Court.

In fact, a petition for a writ of certiorari is pending before the Court in one of the cases directly in conflict with this case. *Murray v. Lawson*, 138 N.J. 206, 649 A.2d 1253 (N.J. 1994), *cert. filed*, No. 94-1450 (U.S., Mar. 1, 1995). Petitioners respectfully suggest that it would be appropriate for the Court to grant plenary review in this case and hold *Murray* until the merits decision or grant plenary review in both cases and have them briefed and

argued in tandem. This course would be the most sensible one to take because, unlike *Murray*, this case presents the distinctive situation of an ordinance being struck down, despite the Court's mandate in *Madsen* that ordinances receive more constitutional deference than injunctions, a mandate that has also been the subject of disagreement among the lower courts. *Contrast Kirkeby*, *supra*, at *2 (striking down ordinance creating 200-foot residential buffer zone), *with City of San Jose v. Superior Court*, 32 Cal. App.4th 330, 38 Cal. Rptr.2d 205 (1995)(upholding ordinance creating 300-foot residential buffer zone)

Indeed, Respondents' perhaps facetious comment that "[c]ontrary to the best efforts of some litigants, municipalities and lower court judges, there is really very little to be confused about in the aftermath of *Frisby*," Opp. at 10-11, completely begs the question. If lower court judges, local governments, and some litigants are indeed confused about where *Frisby* leads -- as in truth they are, despite their best efforts -- and are dissatisfied with the dead-letter formulation of the *Frisby* holding championed by those whose primary objective is to impose a captive audience and thus dissuade by coercion the target of their picketing from conduct they despise, then these are very strong reasons for the Court to review this case.

Finally, Respondents assert two reasons for denying a writ of certiorari, both of which are easily dispatched. Respondents first assert that their conduct does not raise the question posed in the petition. *See* Opp. at 8-9. This assertion is perplexing since the court below struck down the residential picketing ordinance in this case precisely because the picketers walked in front of more homes than

just the targeted residence. Consequently, Respondents' picketing squarely raises the question posed in the petition.[2]

Respondents' only other justification for denying review is their claim that their conduct was protected under *Frisby*. Yet, that is the very question at the heart of this case: whether *Frisby* should be accorded the narrowest possible interpretation, which does not permit any regulation of residential picketing beyond the area directly in front of a targeted residence. Respondents' argument that they have satisfied *Frisby* is one directed at the merits, not at whether this Court should grant review to resolve an important and increasing conflict in the lower courts over both how to apply *Frisby* and whether residential privacy can adequately be protected under their crabbed interpretation of *Frisby*.

In the end, Respondents' soothing refrain that clarity and harmony prevail on the constitutional issues surrounding the controversial and divisive technique of residential picketing utterly fails to mask the current troubled state of the *Frisby* holding. Respondents even pose several "questions" of their own. Opp. at 11. The ambiguities thus belatedly conceded by Respondents reveal the difficulties that lower courts, local governments, and litigants will continue to suffer absent intervention by this Court.

It is becoming increasingly apparent that lower courts will be inclined on their own effectively to overrule *Frisby* by limiting its holding to an absurdly insignifican

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[2] The Eighth Circuit panel in *Kirkeby*, *supra*, at *2, recognized that the issue of the proper interpretation of *Frisby* was directly presented on similar facts and also read the decision of the court below in exactly the same fashion as Petitioners do.

sphere. This Court has emphatically stated, however, that the lower courts must leave "to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). Alternatively, the lower courts will be forced to diverge ever more from a uniform approach to the constitutionality of comparable ordinances. The Court's controlling opinion in *Frisby* deserves more than such an indecent burial, and residential privacy ought not be subject to such conflicting treatment.

CONCLUSION

For these reasons, as well as those set out at more length in the petition, a writ of certiorari should be granted in this case.

Respectfully submitted,

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